FOR ARGUMENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,

*Petitioner,*

v.

ALLAN BAKKE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

## BRIEF OF HOWARD UNIVERSITY AS AMICUS CURIAE

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CASES AND OTHER AUTHORITIES | ii |
| CONSENT OF THE PARTIES | 1 |
| INTEREST OF AMICUS CURIAE | 2 |
| QUESTIONS PRESENTED | 6 |
| SCOPE OF THE QUESTIONS PRESENTED | 6 |
| SUMMARY OF ARGUMENTS | 11 |
| ARGUMENTS: | |
| I. THE CALIFORNIA SUPREME COURT ERRONEOUSLY APPLIED THE LESS RESTRICTIVE MEANS DOCTRINE TO THE UNIVERSITY'S SPECIAL ADMISSION PROGRAM | 11 |
| A. The Accommodation of Competing Interests and the Doctrine of Less Restrictive Alternatives | 12 |
| B. The Use of Disadvantaged Status as a Substitute for Race Consciousness in the Professional School Admission Process | 21 |
| II. THE STATE OF CALIFORNIA SHARES WITH SISTER JURISDICTIONS A COMPELLING STATE INTEREST IN CREATING DIVERSITY IN PROFESSIONAL SCHOOLS AND IN THE PROVISION OF PROFESSIONAL SERVICES TO MINORITIES | 23 |
| A. The Strict Scrutiny Test | 23 |
| (1) The Scope of the Problem | 24 |
| (2) The Compelling Need for Remediation | 30 |
| B. An Alternate Equal Protection Analysis | 31 |
| III. THE THIRTEENTH AMENDMENT AND STATUTES PASSED IN FURTHERANCE THEREOF AUTHORIZE THE ELIMINATION OF THE VESTIGES OF SLAVERY AND RACIAL DISCRIMINATION BY USE OF MEASURES GRANTING PREFERENTIAL TREATMENT TO BLACKS | 37 |

| | Page |
|---|---|
| A. The Scope of the Amendment | 38 |
| B. Congressional Action Pursuant to the Amendment | 40 |
| (1) The Freedmen's Bureau Act | 40 |
| (2) Civil Rights Act of 1866 | 43 |
| (3) Title VI of Civil Rights Act of 1964 | 43 |
| C. The Racial Focus of the Amendment | 44 |
| IV. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 REQUIRES OR PERMITS THE CAL-DAVIS SPECIAL ADMISSION PROGRAM | 49 |
| A. Cal-Davis' Prior Admission Practices Violated the Substantive Title VI Regulations | 50 |
| B. Cal-Davis Was Required to Adopt a Special Admission Program | 54 |
| C. At a Minimum Cal-Davis was Permitted to Adopt the Special Admission Program | 57 |
| D. Title VI Authorized the Applicable Regulations | 59 |
| E. The "Permissive" Regulation Is Consistent with the Statutory Purpose | 61 |
| F. Title VI is Constitutional | 64 |
| V. CONCLUSION | 68 |


**TABLE OF AUTHORITIES**

*Cases:*


| | |
|---|---|
| Albemarle Company v. Moody, 422 U.S. 405 (1975) | 60 |
| Alevy v. Downstate Medical Center, 348 N.E.2d 537 (1976) | 35 |
| Bakke v. The Regents of the University of California, 553 P.2d 1152 (1976) | 12,13,17,28 |
| Beer v. United States, 425 U.S. 130 (1976) | 36 |
| Bolling v. Sharpe, 347 U.S. 497 (1954) | 67 |
| Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) | 5,48,65 |





| | Page |
|---|---|
| City of Richmond v. United States, 422 U.S. 358 (1975) | 35 |
| Civil Rights Cases, 109 U.S. 3 (1883) | 38,45,46 |
| Cook v. Ochsner Memorial Hospital, 319 F. Supp. 603 (D. D.C. (1973) | 65 |
| Crawford v. Los Angeles Unified School District, 130 Cal. 72 (1976) | 18 |
| DeFunis v. Odegaard, 82 Wash. 2d 11 (1973) | 9,11,35 |
| Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) | 66 |
| Gomillion v. Lightfoot, 364 U.S. 339 (1960) | 35 |
| Griggs v. Duke Power, 401 U.S. 424 (1971) | 52,60 |
| Green v. New Kent County, 391 U.S. 430 (1968) | 68 |
| Hernandez v. Texas, 347 U.S. 475 (1954) | 34 |
| Hirabayshi v. United States, 320 U.S. 81 (1943) | 14 |
| Hughes v. Superior Court, 339 U.S. 460 (1950) | 14 |
| Jefferson v. Hackney, 304 F. Supp. 1332, vacated 397 U.S. 821 (1970) | 60 |
| Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) | 40,67 |
| Johnson v. San Francisco, 339 F. Supp. 1315, remanded 500 F.2d 349 (1974) | 58 |
| Jones v. Alfred E. Mayer, 392 U.S. 409 (1968) | *passim* |
| Katzenbach v. Morgan, 384 U.S. 563 (1976) | 67 |
| Koretmatsu v. United States, 323 U.S. 214 (1944) | 14 |
| Larry P. v. Riles (Consent Decree) | 58 |
| Lau v. Nichols, 414 U.S. 563 (1974) | 18,58,59,66 |
| Lee v. Nyquist, 318 F. Supp. 710 (W.D. N.Y. 1970) | 58 |
| McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) | 44 |
| McLaughlin v. Florida, 379 U.S. 184 (1964) | 14,21 |
| Milliken v. Bradley, 418 U.S. 717 (1974) | 58 |
| Morton v. Mancari, 417 U.S. 535 (1974) | 14,67 |
| North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) | 14 |

| | Page |
|---|---|
| Plessy v. Ferguson, 163 U.S. 537 (1896) | 45,46,48 |
| Reitman v. Mulkey, 387 U.S. 369 (1969) | 57 |
| Rodriguez v. San Antonio Independent School District, 411 U.S. 1 (1973) | 32,34 |
| Runyon v. McCrary, 427 U.S. 160 (1976) | 39,40 |
| San Francisco Unified School District v. Johnson, 3 Cal.3d 937 (1971) | 18 |
| Shelton v. Tucker, 364 U.S. 479 (1970) | 12 |
| Serrano v. Priest, 487 P.2d 1241 (1971) as modified, 557 P.2d 929 (1977) | 18,57 |
| Soria v. Oxnard, 488 F.2d 579 (9th Cir. 1973) | 18,58 |
| Spangler v. Pasadena City Board of Educ., 311 F. Supp. 501 (D.C. Cal. 1970) | 18,58 |
| South Carolina v. Katzenbach, 383 U.S. 301 (1966) | 24 |
| Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) | 14,22,58 |
| Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431 (1973) | 40,43 |
| United Jewish Organizations of Williamsburgh v. Carey, ____ U.S. ____ (1977) | *passim* |
| United States v. Carolene Products Co., 304 U.S. 144 (1938) | 34 |
| United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. den. 404 U.S. 984 (1971) | 56 |
| United States v. Local Union No. 212, International Brotherhood of Electrical Workers, 472 F.2d 634 (6th Cir. 1973) | 56 |
| Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission, 490 F.2d 387 (2nd Cir. 1973) | 56 |
| Washington v. Davis, 426 U.S. 229 (1976) | 60 |
| *Constitution and Statutes:* | |
| United States Constitution, Thirteenth Amendment | *passim* |
| United States Constitution, Fourteenth Amendment | 14,21,34,37,45 |
| Civil Rights Act of 1866, 42 U.S.C. 1981 (1970) | 39,40,43,44 |





| | Page |
|---|---|
| Civil Rights Act of 1866, 42 U.S.C. 1983 (1970) | 40,43 |
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| Association of American Law Schools, By Laws (1972) | 7 |
| Association of American Medical Schools, Medical School Admission Requirements, 1977-78 (1976) | 7,23 |
| Amicus Curiae Brief of the Law School Admission Council in *DeFunis v. Odegaard* (1974) | 20 |
| Auerbach, Unequal Justice (1976) | 10 |
| Bell, Race, Racism, and American Law (1973) | 47 |
| Bittker, The Case for Black Reparations (1973) | 49 |
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Page

Lyndon B. Johnson, Address Upon The Occasion Of The Dedication Of The Lyndon Baines Johnson Library (1972) ..... 24

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N.Y. Times, June 5, 1965 ..... 48

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Page

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## BRIEF OF HOWARD UNIVERSITY AS AMICUS CURIAE

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### CONSENT OF THE PARTIES

Howard University files this amicus brief, with the consent of both parties, in support of the position advanced by the Petitioner. Letters of consent have been filed with the Clerk of this Court.

## INTEREST OF THE AMICUS CURIAE

> Howard University is the first mature university organization to come to pass among Negroes in the modern civilized world. Its growth from the humblest beginnings is one of the great romances of American education. During all the early years, while the founder and his associates worked, pseudo-scientific men were busily engaged in giving various reasons why serious education of the kind here undertaken should never be attempted among Negroes.[1]

Howard University was established as a private nonsectarian institution by Act of Congress on March 2, 1867. Since its inception, the University has grown from six departments in 1867 to its present composition of seventeen schools and colleges. Nearly 40,000 students have received diplomas, degrees or certificates from Howard; of that total, well over 14,000 have received graduate and professional degrees. Throughout this century of growth, the unique mission of the University has been supported in the main by congressional appropriations. Since 1928 Howard University, while remaining a private institution, has received continuous annual financial support from the federal government.[2] Today, the

[1] Excerpt from the address of Dr. Mordecai Wyatt Johnson on his inauguration as the thirteenth president of Howard University, 1926.

[2] The Committee on Education commenting on the bill to amend section 8 of an act entitled "An Act to incorporate the Howard University. . .." stressed:

> Apart from the precedent established by 45 years of congressional action, the committee feels that Federal aid to Howard University is fully justified by the national importance of the Negro problem. For many years past it has been felt that the American people owed an obligation to the Indian, whom they dispossessed of his land, and annual appropriations of sizable amounts have been passed by Congress in fulfillment of this obligation. . ..
>
> Moreover, financial aid has been and still is extended by the Federal Government to the so-called land-grant colleges of the various States. While it is true that Negroes may be admitted to these colleges, the conditions of admission are very much restricted, and

*(continued)*



University's land, buildings and equipment are valued at more than 90 million dollars. Thus, both the executive and legislative branches are sensitive to the need to maintain Howard as an institution in service to blacks.

Howard University is keenly interested in the outcome of this litigation. This Court's decision may significantly affect the unique mission and continued integrity of historically black institutions. Affirmance of the California Supreme Court has the potential of not only undoing affirmative action but could unwisely erode the legal bases of black institutions.

Historically, Howard and the other black colleges and universities in this country have been the major training grounds for American blacks, as well as for other minorities and the foreign born. Howard alone has trained nearly fifty percent of the black lawyers in the United States, and its School of Law is still the major single supplier of black law graduates who seek admission to the Bar. Similarly, the College of Medicine, which was organized in 1868, trains more black doctors than any other university in the nation. Recent changes in the admission policies of other professional schools during the past decade are now contributing to an increase in the number of black lawyers and doctors. This growth is attributable almost exclusively to recently instituted programs specifically designed to recruit and train minority professionals. To affirm the decision of the California Supreme Court in this case could mean an end to the substantial inroads made by professional schools and other institutions throughout the country to provide quality services

*(footnote continued from preceding page)*

> generally it may be said that these colleges are not at all available to the Negro, except for agricultural and industrial education. This is particularly so in the professional medical schools, so that the only class A school in America for training colored doctors, dentists, and pharmacists is Howard University, it being the only place where complete clinical work can be secured by the colored student. (Committee on Education Report Accompanying H.R. 8466 [1926]. See also, 14 Stat. 1021 [1928]).

to minorities and the poor and to allow those previously discriminated against to participate fully in our society.

Yet, despite the increased black enrollment in many professional schools and other institutions that previously excluded minorities, the continued existence of Howard and the other black institutions is essential. Howard has always been sensitive to the need to furnish adequate legal, health and other services to disadvantaged persons. It is in this regard that Howard has and to a large measure continues to be unique. The recently expressed concerns of many institutions of higher education solely with numbers and ratios misses the point since the "numbers problem" is symptomatic of the much more basic need to democratize our society by drastically reshaping the role and function of minorities in all aspects of American life. Howard, or any other institution, will be accomplishing little if it simply preserves the status quo. The character and personality of the institution, among other things, shapes the values of the students and affects the students' choice of a career.

> To the extent that social justice means equity and opportunity for all Americans, not only in proclamation but also in reality, to that extent must the rendering of social justice become the major item of priority on the national agenda. But in order for social justice to become established, it is required that every American be given access to the opportunities, rewards and benefits of this society as well as the equal protection of its laws. What this means for us in education is that education must become the major instrument by which and through which this national commitment will be exercised and this national objective achieved.[3]

The reputation of Howard University as a catalyst for social change is legendary. The Law School which was dubbed the

[3] "For This And Future Generations: The Importance Of A New Era," Howard University's 102nd Formal Opening Address by Dr. James E. Cheek, fifteenth president of the University, cited in Reid, "Twenty Year Assessment of School Desegregation," 19 How.L.J.5,11 (1975).



"West Point of the Civil Rights Movement," along with the NAACP, was instrumental in over thirty civil rights cases since 1938, including the landmark case, *Brown v. Board of Education of Topeka, Kansas*, and in the passage of the Civil Rights Act of 1964. "Howard Law School became a living laboratory where civil rights law was invented by team work."[4] Students worked on briefs for actual cases and accompanied faculty members to court to observe the litigation of important cases concerning the rights of black people. The first civil rights law course in the country was conceived and taught at the Law School.

Howard's service to the Black community has not been limited to the field of Law. In 1975 the University opened a new 500-bed hospital which also serves as a teaching facility for the Schools of Medicine, Dentistry, Nursing, Pharmacy and Allied Health. The Department of Health, Education and Welfare has certified the new hospital for a kidney transplant center. The Center for Sickle Cell Disease is intensely involved in screening and identifying persons suffering from the disease and increasing public awareness of the perils of the malady.

Many Howard graduates, who might not have otherwise been allowed the opportunity for higher education, have gone on to make significant contributions in fields such as African and Black American history, marine biology, music and the performing arts, religion and theology, child and family life, education and international diplomacy. There is a continuing need for more minorities in every vocation–in the North as well as in the South. The demand for minorities with college and professional training is far in excess of the number presently available. Participation in higher education by minorities continues to lag behind that of the general population, while there is every reason to expect that new demands will continue to increase and the lack of adequate minority representation will have an extremely deleterious effect not only on the movement toward the ultimate

[4] Kluger, *Simple Justice*, (Knopf, 1976) at 126.

national goal of full equality but on the very processes of government as well. Howard University and its sister black colleges and universities are steeped in the tradition of service to our society. Such a valuable tradition of enlightened ideas and ideals must continue along with affirmative action programs at the other institutions of higher education in this country.

## QUESTIONS PRESENTED

1. Does the ameliorative use of race or ethnicity as one of several factors for selecting well-qualified candidates for professional school admission deny equal protection of the laws to non-minorities who may thereby be excluded?
2. Where the use of unvalidated, traditional admission criteria exclude specified minorities, do Title VI of the Civil Rights Act of 1964 and the ensuing regulations either require or authorize a public university to separately screen and preferentially admit qualified members of those minority groups?

## THE SCOPE OF THE QUESTIONS PRESENTED

The actions of the University of California-Davis (Cal-Davis) Medical School cannot be constitutionally evaluated in a meaningful way by viewing its special admission program in isolation or merely as one facet of the state higher education system's affirmative action efforts. The Cal-Davis Medical School, like its School of Law, is part of a network of institutions which come together to fashion policy through national associations such as the Association of American Medical Colleges and the Association of American Law



Schools.[5] They are subject to the special scrutiny of federally recognized accrediting bodies such as the American Bar Association and the American Medical Association. Any school which fails to comply with the standards established by these latter associations runs the risk of losing institutional support and student financial assistance from government

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[5] See AAMC, Medical School Admissions Requirement, 1977-78 at 49 (1976) which sets forth the policy statement adopted on Dec. 16, 1970 by the Exec. Comm. of the Assoc. of Amer. Med. Colleges. The statement reads in part:

> "The AAMC and its constituent members are directing earnest attention and effort toward the goal of increasing minority opportunities in medical service, teaching, and research. A detailed description of these goals is contained in the 'Report of the AAMC Task Force to the Inter-Association Committee on Expanding Educational Opportunities in Medicine for Blacks and Other Minority Students' that was approved by the AAMC Executive Council on May 7, 1970.
>
> . . .
>
> In developing new and modifying existing educational programs, medical school faculties should be aware that minority students, while not always as well prepared in the traditional sciences basic to medicine, bring to the profession special talents and views which are unique and needed. Educational programming for all medical students should be sufficiently flexible to allow individual rates of progress and individualized special instruction. With such programming, the opportunity for minority student success will be maximized."

See also, Art. VI, §3(a) Assoc. of Amer. Law Schools By-Laws (1972) where the approved Association policy on minority law school admissions is set forth in part as follows:

> The denial by a member school of admission to a qualified applicant shall be treated as made upon the ground of race, color, religion, national origin, or sex if the ground of denial relied upon is:
>
> i. A state constitutional provision or statute that purports to forbid the admission of applicants to a school on the ground of race, color, religion, national origin, or sex; or
>
> ii. An admissions qualification of the member school which the Executive Committee finds to have been intended to prevent the admission of applicants on the ground of race, color, religion, national origin, or sex though not purporting to do so.

*(continued)*

sources. However the influence and impact of these associations exceeds these strictures.[6] The prestige of a professional school is in fair measure determined by the evaluation and recognition it receives from an accrediting body.

Cal-Davis' special admissions program, as well as the University of Washington's in *DeFunis v. Odegaard*, 416 U.S. 312 (1974) are a response to a societal problem created only in part by those states' educational systems. Because of these systematic discriminations at the local level and the history of malignant neglect and purposeful injury which attended the national associations it was necessary to launch efforts to remediation on a scale equal to that of the original harms.

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*(footnote continued from preceding page)*
The American Bar Association has announced a similar policy, see Approval of Law Schools: ABA Standard and Rules of Procedure at 5 (1973).

[6] Since 1968 the American Bar Association Fund for Public Education has administered the federally funded program on Legal Education Opportunity. CLEO, as the program is popularly known is sponsored jointly by the American Bar Association, the Association of American Law Schools, La Raza National Lawyers Association, the Law School Admission Council and the National Bar Association. Its purpose is to provide economically disadvantaged students, many with non-traditional admissions credentials, an opportunity to attend an accredited law school and ultimately to enter the legal profession. To this end CLEO inspires and participates in recruiting programs to inform and encourage students to choose law as a career. It operates, with the cooperation of several accredited law schools, six-week summer institutes which provide selected students a means of identifying their capacity for law study and an opportunity to acclimate to that process.

The overwhelming majority of CLEO program participants are low-income minority students whose academic credentials are such that they would not be admitted on a strictly competitive basis to the schools in which they enroll. For each of the past nine years several prelaw institutes were hosted by various law schools across the country to assist such students in gaining law school admission.

Project 75 is an analogous effort on the part of the National Medical Association to achieve greater minority participation in the medical profession.



The tiering which has occurred within the pervasively powerful professions of law and medicine is not the result of the inevitable press of merits as some profess, but not so curiously correlates with race and religion, with class and color and sex, with background and education and the opportunity for education. In the closing years of the decade of the seventies we must require that these professions constantly account for their public trust. The professions themselves have slowly come to realize their awesome responsibility and have accordingly sought to determine their accountability, to justify the basis on which they decide who joins their ranks and to guage the interest protected by the rules they impose on their membership and regulatees. The response has been implemented through the policy statements of the national organizations, their local affiliates and the gate keepers—the law and medical schools of the nation.

There is a compelling need to create a balance in the legal and medical professions. Perhaps more than any others they reflect the values and mores of the dominant cultural group in America. Because of their pervasive impact throughout our society, the discriminations which infect the larger society are more virulent and detrimental in legal and medical educational institutions.[7] And reciprocally, because they so thoroughly permeated the professions, they have been so lasting in the larger society. As a result of the invidious racial, ethnic and sex discriminations which continuously escape historical status, the legal and medical training centers produced until a decade ago, a pastuerized product with the "cream" steadily oozing to the top. Only the assassin's bullet brought relief. And now again we stand at the proverbial fork querying

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[7] Auerbach, Unequal Justice, *passim* (Oxford, 1976). Professor Auerbach has made a unique contribution in providing a social history of the elite of the American bar. His focus is on that strata of the profession which is comprised of the power-brokers, the super-lawyers, the corporate establishment and those who move freely from private practice and academe into public life and back again.

whether to journey the road not taken. The corrective policy judgments made by the national professional associations and their implementation willingly undertaken by a number of public and private professional schools have led some to question the constitutional limitations on that policy.

This very difficult question which will not only impact the professions but race relations and affirmative activity throughout society, will constantly nag this Court for a definitive response. Some amici who opposed the grant of certiorari in this case pressed for an avoidance of the constitutional issue on the grounds that Bakke lacked standing, that the suit had a collusive quality and that the record adduced at trial was an unworthy basis for deciding questions of the enormity here involved. Others are likely to reraise those concerns at the merits stage. This Court will doubtless independently inquire into these matters. However, this Court has evolved a flexible jurisprudence on these threshold questions. We maintain that issues raised are not as narrow as the specific contours of Cal-Davis's special program would frame them. Accordingly, we earnestly urge this Court to resolve on the merits the constitutionality of the broader institutional policy judgments which Davis' program reflects.

Since the declaration of mootness in *DeFunis*, we have been in a "constitutional no-man's land" without meaningful guidance as to limitations on a policy of affirmative action. Should the Court again render a non-merits decision, the national associations as guardians of a precious public trust will be doubtful of the vigor with which their announced policies should be pursued. The views of the several amici, the exhaustive literature on the core question and this Court's own expertise regarding the history of race relations in this country, furnish an ample basis for decision. That history "cannot be undone, but those who know it may enjoy the opportunity to escape its tenacious hold."[8]

[8] Id. at 13.



## SUMMARY OF ARGUMENTS

Race as a consideration in law school admissions reflects a compelling state interest to remedy the gross underrepresentation of black and other minorities in higher education. The special admission program of the University of California-Davis cannot be viewed in a vacuum and the Court should resolve the broader institutional policy judgments which the Davis program reflects.

Minority admission programs are required or at least permitted by Title VI of the Civil Rights Act of 1964. Furthermore, the Thirteenth Amendment authorizes the use of these measures to grant preferential treatment to blacks.

The commitment of institutions of higher education to select qualified minority applicants to further the goal of full equality should be allowed to continue.

## ARGUMENTS

### I.

### THE CALIFORNIA SUPREME COURT ERRONEOUSLY APPLIED THE LESS RESTRICTIVE MEANS DOCTRINE TO THE UNIVERSITY'S SPECIAL ADMISSION PROGRAM.

The California Supreme Court held that the University's racially preferential admission program required strict scrutiny and could only be justified upon a showing of a compelling state interest in integrating the state medical school and in improving medical care for minorities. Though the court specifically rejected as parochial the University's assertion that minority doctors would more likely serve minority communities, it assumed *arguendo* that the University otherwise established a sufficient basis for the ameliorative use of race

in its medical school admission process. The majority, however, immediately neutralized its assumption by concluding that the availability of less intrusive means of achieving its objectives made the state's use of racial classifications less compelling.

### A. The Accommodation of Competing Interests and the Doctrine of Less Restrictive Alternatives.

In point of analysis, "means less detrimental to the rights of the majority"[9] should be employed when available.[10] However, the means suggested by the court, and other means commonly touted as substitutes for race conscious admissions,

[9] *Bakke*, 553 P.2d 1152,1165.

[10] See *Shelton* v. *Tucker*, 364 U.S. 479 (1970), in which Justice Stewart writing for the Court essayed:

> The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. . . .
>
> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. . . .
>
> The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. . . 364 U.S. at 487-8.

See also, O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L.J. 699, 717-18 (1971) and see generally, Wormuth and Harris, The Doctrine of the Reasonable Alternative, 9 Utah L.R. 254 (1964); Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 4o4 (1969).



will not, without subterfuge or subtle evasion, achieve the otherwise legitimate state objectives. The undergirding concern of the California court was not merely with the less intrusive means but lamented as well the University's failure to demonstrate that the adopted means were the most effective for achieving its desired ends. The distress of this position derives from the extraordinary premium the court places on legalisms. The Justices complain, ". . . there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive."[11]

For the University's house of cards to fall because of its failure to adduce proof as to selflessness and selfishness of racial groups is particularly inapposite. If intrusiveness and inefficiency of means are determined by such proof, with the consequence that the compelling governmental interest is undermined by its absence, the court would have done well to presume, on the basis of pervasive principles of human nature, the uniformly *selfishly* social orientation and the *selfishly* acquisitiveness of all racial groups.[12] As a matter of realism,

[11] *Bakke*, 553 P.2d at 1167.

[12] The California Supreme Court sophistically argues that absent an injury to non-minorities it would be just to require more than "merely removing the shackels of past formal restrictions." In the presence of such injury, the court continues, a preference is counterproductive for three reasons: (1) race will underly important decisions through the school years and beyond and be a devisive factor; (2) pragmatic problems of administration will arise, e.g., "human nature suggests a preferred minority will be no more willing than others to relinquish an advantage once bestowed; and (3) a precedent that the Constitution countenances race discrimination is too dangerous. *Bakke*, 553 P. 2d at 1170-71.

The court's stated reasons, though unintentionally so, are specious. The *first* is neither commanded by logic, experentially supported, nor likely to come to pass. The *second* poses no insoluble problem of administration and tacitly approves a nonminority tenacious hold on an advantage, first formally bestowed and later informally maintained and justifies maintaining the status quo because human nature suggests a preferred minority will also steadfastly adhere to an advantage once bestowed. The court then

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ours is in large measure an ethnic society, but in the main not in a pejorative way. Members of racial and ethnic groups tend to organize and form communities on the basis of these factors. Such formations are a normal social consequence of common backgrounds, traditions, beliefs and customs. At their best, these communities are not mechanisms of exclusions.[13] Regretfully, too often in regard to groups who are the beneficiaries of preferential programs, these formations were an imposed isolation resulting from majoritarian legal, political, social and economic oppressions which created this nation's reservations, barrios, and ghettos.

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vitiates the preference which was accorded by Cal-Davis. The *third*, and in the court's view, "perhaps the most important" reason for its holding is particularly curious. In declaring any constitutional recognition of race discrimination (ameliorative or invidious) as dangerous, the California Supreme Court has ignored the intimations and precedents of this Court in *Morton* v. *Mancari*, 417 U.S. 535 (1974); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); and in *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971), where this Court stated:

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also race must be considered in formulating a remedy." 402 U.S. at 45.

The California court has created a schism between constitutional history and law, viewing the latter as a set of technical rules with no historical, political or social basis. It has adopted an inflexible rule for fear of abuse of its precedent. However, the process of constitutional accommodation of competing interests even in so sensitive an area as discrimination based on race does not reach *per se* heights. See, e.g., *Korematsu* v. *United States*, 323 U.S. 214 (1944), *Hirabayshi* v. *United States*, 320 U.S. 81 (1943). One would scarecly argue that the curfew and exclusion cases have significant substantive precedential value. Most significant, however, is that this court has scrupulously avoided holding racial classifications as *per se* violations of the Fourteenth Amendment. *United Jewish Organizations of Williamsburg, Inc.* v. *Carey*, slip opinion at 15 (1977); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964).

[13]See, *Hughes* v. *Superior Court*, 339 U.S. 460, 464 (1959), where the Court recognized the social reality of ethnic concentrations.



It would be naive to suppose that the manner in which the medical profession (we could as well substitute the legal profession) determines and regulates its membership has no direct impact on the distribution and quality of available medical (legal) services. We do know that admissions criteria, fee arrangements, pre-paid service plans the full panoply of professional regulation has resulted in a disproportionate number of white male doctors (lawyers) and in the provision of far superior services for white males and their families. Correspondingly, less than 2½ percent of the nation's doctors are black[14] and the health problems of blacks are significantly greater: shorter life expectancies, greater maternal and infant mortality.[15] For those who are *dubitante* as to the causal relationship or who consider the suggested nexus fallacious *post hoc ergo propter hoc* reasoning, dispositive empirical evidence can only be found after a sufficient period during which race is amelioratively used to bring into the profession previously excluded minorities.

To suppose that medical (legal) services to minorities would not be enhanced by the training of more minority professionals is to ignore social realities. Historically black professionals were barred from serving white clientele and exclusively administered to the medical and legal needs of blacks. Though barriers to a diversified practice are not now as high or impermeable, social influences yet prevail to the same end. That is not to say that non-blacks do not and will not continue to serve black patients or clients. Our experiences indicate, however, that in far greater proportion black professionals will serve blacks, just as white doctors and lawyers have and do disproportionately serve whites. So long

[14]See Spruce, Toward a Larger Representation of Minorities in Health Careers, 64 J. Med. Educ. 432-36 (1972).

[15]Nelson, et al, Educational Pathway Analysis for the Study of Minority Representation in Medical School, 46 J. Med. Educ. 745-749 (1971).

as this social phenomenon exists, race conscious professional school admission is a rational and effective means of serving the compelling governmental interest in providing an integrated training environment and better professional services to minority groups.

In rejecting race classifications as a means of achieving the state's goals, the California court posits several less intrusive alternatives which in its view would efficiently achieve the state's compelling interests. The following table sets forth the court's less restrictive means analysis:

**TABLE I**

| State's Objectives or Goals | Less Restrictive Alternatives Available to the State (1) | (2) | (3) |
|---|---|---|---|
| Integration of Medical Schools | Flexible admissions criteria: "soft data", e.g. letters of recommendation and stated professional aspirations | Premedical prepatory programs for qualified, non-competitive, disadvantaged students of all races | Expanding seats in available medical schools and construction of new schools |
| Improved Medical Care for Minorities | Accord preference to applicants who previously demonstrated concern for minorities and who declare they will serve them after graduation | Curriculum emphasis on minority needs and on training of general practitioners | |

It is fundamental that the less restrictive means analysis is supplemental to the basic process of accommodating competing interests. Neither the absence of such means nor the existence of less restrictive alternatives, of themselves, determine whether a governmentally adopted regulation is constitutional. There invariably exists some alternative which could substitute for the means selected by the state to achieve a particular substantial state objective. However, the grist of the analysis is in weighing degrees of intrusiveness and in considering factors of efficiency and costs. Once the court



adopted a *per se* rule of race discrimination[16] it effectively foreclosed further inquiry and with consistency concluded that "[t]o uphold the University would call for the sacrifice of principle for the sake of dubious expedeniency. . . ."[17] But this conclusion is not at all consistent with the court's *arguendo* assumption that the state's interest in achieving a diversified medical school environment and greater medical care for minorities is compelling – not minimal, not reasonable or even substantial, but a compelling interest.

Such a characterization, one might argue, suggests that the governmental interest is so strong that even if the regulation adopted to promote that interest is only minimally related to achieving the state's objective, the regulation should pass constitutional muster despite its impinging the constitutional interest of non-minorities. Let us assume, however, that a more rigorous application of the doctrine is called for.

Before considering the several alternatives set forth by the state supreme court, consider the more efficient means often suggested as a substitute for the minority group preference adopted by the University. Rather than employing the special admissions program it did, the University could have designed a system of screening and investigation to determine which individual minority applicants were detrimentally affected by state perpetrated discrimination at either the primary, secondary, or undergraduate levels.[18] Any resulting preferential

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[16]See note 4 supra.

[17]*Bakke*, 553 P.2d at 1171.

[18]Presumably the California State Supreme Court would countenance a special admission program at Davis for persons who had been officially discriminated against by any of the campuses in the state higher education system even though the court notes that "[n]either party contended in a trial court that the University had practiced discrimination, and no evidence with regard to that question was admitted. . . ." (By footnote the Court recognized that no party to the suit had an interest in raising such a claim). *Bakke*, 553 P.2d 1152, 1169.

Accordingly, persons who had been discriminated against by a state at the primary and secondary levels exclusively could be allowed preferential

*(continued)*

admission program would encompass only those minorities who were demonstrably handicapped by past discrimination. No minority group member who was not significantly injured would be entitled to preferential treatment. The fairness and efficiency of such a system is manifest. Those with the greatest stake in routing out discrimination would gain entrance via the special program. Integration of the medical schools would be achieved and the group most likely to administer to other victims of racial oppression would be identified. The new regulations would significantly diminish if not eliminate (depending on the accuracy of the determinations) the impingement of non-minorities' equal protection interest. The governmental costs of screening and investigation, however, would be extraordinary. The difficult factual and causal determinations would be correspondingly intolerable. Minorities excluded from the specially screened pool would arguably be entitled to reasonable administrative review of determination of their non-eligibility.

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consideration at the university level. The case law illustrating the well entrenched racial discrimination existing in California primary and secondary schools is substantial. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Soria* v. *Oxnard*, 488 F.2d 579 (9th Cir. 1973); *Spangler* v. *Pasadena*, 311 F. Supp. 501 (1970); *San Francisco Unified School District* v. *Johnson*, 3 Cal. 3d 937 (1971); and *Crawford* v. *Los Angeles Unified School District*, 130 Cal. 3d 72 (1976), wherein the California Supreme Court determined that the School District had an affirmative duty to alleviate segregation, regardless of whether it is *de facto* or *de jure*. Accord, *Serrano* v. *Priest*, 487 P.2d 1241 as modified, 557 P.2d 929 (1977) (economic discrimination). See also, A Generation Deprived, Los Angeles School Desegration, A Rept. of the U.S. Comm. on Civil Rights 6-12 (1977) (a brief history of school segregation in Los Angeles, Calif.); Fulfilling the Letter and Spirit of the Law, A Rept. of the U.S. Comm. on Civil Rights 50-54 (1978) (description of desegregation efforts in Berkeley, Calif. up to 1968). Extending the reasoning further, and recognizing the highly mobile nature of our society, like discrimination against minorities by sister states would as well furnish a basis for the State of California to furnish preferences to affected individuals.



In such a setting it would not be unreasoned for the state to conclude that the cost of so highly an individualized consideration of racially discriminatory impact would be too great. The University, as the duly charged state agency, recognized that the process of professional school admission, as it has evolved in the last fifteen years, has erroneously equated depersonalization with objectivity.[19] This guise of objective fairness has denied minority access to the professions to a disproportionate degree. In addition, the state may well have concluded that costs were similarly prohibitive for a more generalized response which would identify public school systems that were de facto segregated in the post-*Brown* era, or were racially motivated in making per pupil expenditures or which assigned teachers on a discriminatory basis. The rationality of such a conclusion is buttressed by the inscrutable nature of the inquiry. The pervasive and virulent race discrimination which pervaded our society during the formative years of present-day professional school applicants is clear.[20] The University's consideration of race and the

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[19]See, ABA Report of the Task Force on Professional Utilization at 13 (1973), where it is reported that in 9961 only eight of the 134 ABA-approved schools had entering classes with median LSAT over 600. With increased applications for law school admission, by 1972, over two-thirds of the law schools had students with comparable test scores. See also, Access to the Medical Profession in Colorado by Minorities and Women, (1976). In this report of the Colorado Advisory Committee to the U.S. Commission on Civil Rights, a similar trend is detectable. Id. at 26, 42.

[20]Though three years have passed since Professor Harry Reese eloquently discribed the state of race relations in this country during the formative years of a typical minority law school applicant his observations are equally descriptive of medical school aspirants.

> "The typical minority applicant who applied to law school with petitioner was born in the year when this Court decided *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), and grew up in an era of segregated housing. He entered public school the year this Court decided *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and was entered into a system of segregated education. He was sixteen and ready for the job market when Congress prohibited discrimination in employment
> *(continued)*

economic background of minority students was a rational response to overcoming the systematic exclusions which run throughout our nation's history.

The California court has ruled that all racial classifications are prohibited. To improve medical care to minorities a more effective special admission system would extend a preference to applicants who previously demonstrated a concern for minorities and who declare an intention to serve minorities upon graduation. It suggests a curriculum emphasis on minority needs and on the training of general practitioners would better serve the state's objectives. While these innovations would indeed further harmonize the delivery of medical services, they are adjuncts to urgent efforts to increase the pool of doctors who are by choice and present day social influences most likely to administer to generalized and specialty medical needs of minorities. Additionally the suggestions are blind to the need of this society to spread the benefits and rewards of professional life to all segments of society.

The state court recommends several means for expanding opportunities for medical school admission to a broader cross-section of society by: (1) using more flexible admission criteria; (2) establishing premedical preparatory programs for disadvantaged students of all races, and (3) enlarging the number of available medical school seats. Such efforts command our fullest endorsement. But they are not calculated to achieve meaningful integregation in the medical

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with the Civil Rights Act of 1964. It is insisted, however, that the law school was forbidden to take account of these cumulative handicaps because it had not previously been adjudicated guilty of any racial discrimination. The argument leads to the remarkable conclusion that the Constitution compels the innocent to become complicit to the wrongful discrimination by enforcing its consequences and excluding the victim because he has been wronged in the past by others. Amicus Curiae Brief of the Law School Admission Council in *DeFunis* v. *Odegaard* (No. 72-235) at 24-25 (1974).



education environment or the obvious benefits to be derived from such a setting. These suggestions are born of the notion that the use of all racial classifications, benign or invidious, violate the Fourteenth Amendment.[21] This Court has assiduously avoided such a ruling. *United Jewish Organizations of Williamsburg, Inc. v. Carey* (Slip Opinion at 15 (1977); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Tancil v. Wools*, 379 U.S. 19 (1964).

### B. The Use of Disadvantaged Status as a Substitute for Race Consciousness in the Professional School Admission Process.

The California court holds that public administrators of special admission programs must scrutinize individual files of all applicants without regard to race to determine whether those preferentially admitted were in fact disadvantaged, either in an educational or economic sense. It reasoned that the University posits race as the *sine qua non* of disadvantaged status and attempts to hurdle the constitutional barrier to race by drawing a false equation between race and the deprivation required to warrant preferential treatment in the admission process. Assuming this Court will continue to carefully review each racial classification which comes before it and eschew *per se* rules of unconstitutionality, it is important to note that there is no rigid dichotomy between preferential programs based on race and those based on disadvantaged status. They pose no conflicts in logic or constitutional doctrine. As indicated by Chief Judge Coffin writing for a unanimous court in *Associated General Contractors v. Altshuler*, 490 F.2d 9, 16 (1st Cir. 1973):

> "The first Justice Harlan's much quoted observation that 'the Constituion is [colorblind] . . . [and] does not . . . permit any public authority to know the race of

[21] See note 12, supra.

those entitled to be protected in the enjoyment of such rights,' *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (dissenting opinion) has come to represent a long term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities."

Pursuit of color consciousness in order to hasten the advent of a truly colorblind approach to admission does not foreclose or conflict with the simultaneous application of a racially neutral preferential admissions system which takes into account the economic and the educational deprivations resulting from environmental factors. Indeed, several professional schools have formalized their own special admission programs which do exactly this and some schools in the Appalachian region consider background deficiencies of capable nonminority applicants, as well as minorities, in determining preference. Whether the Constitution requires such balance is an open question. Seemingly there is little question as to its constitutional permissibility and its educational and moral warrants.

The recognition of race in the professional school admissions process, as has been judicially approved in a number of other contexts, *United Jewish Org. of Williamsburg, Inc. v. Carey*, ____ U.S. ____ (1977); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Assoc. Gen. Contractors v. Altshuler*, 431 F.2d 9 (1st Cir. 1973); *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), will only speed the day when this dual approach will be rightly sacrificed to the longer term goal of colorblind admissions.



The stark fact is that all minority enrollments from academic 1968-1969 to academic 1976-1977 rose from 1,902, in a total law school enrollment of 68,779 to 9,524 in a total law school enrollment of 125,010 only because law schools established affirmative action programs.[22] But these innovations have merely carried us to the brink of progress. Now ironically we are met by a state high court determination that the constitutional fuels which propelled us to the brink are themselves offensive to that very source of legal power. While the argument in the abstract may be sound, it is untimely pressed. The subordinate ruling that preferences are quotas and quotas are inherently evil and constitutionally offensive is less sound and ignores the potential use of preferences for remedial and utilitarian purposes. Admittedly, racial classifications deserve particular scrutiny: "Their purpose may become perverted: a benign preference under certain conditions may shade into malignant preference at other times."[23]

## II.

## THE STATE OF CALIFORNIA SHARES WITH SISTER JURISDICTIONS A COMPELLING STATE INTEREST IN CREATING DIVERSITY IN PROFESSIONAL SCHOOLS AND IN THE PROVISION OF PROFESSIONAL SERVICES TO MINORITIES.

### A. Strict Scrutiny Test.

The California court assumed *arguendo* that there was a compelling state interest to justify the use of a racial

[22] Memorandum from Millard Rudd to Executive Committee of the AALS entitled Revised Fall 1976 Minority Group Enrollment Statistics (Apr. 1, 1977). From academic 1969-70 to 1975-76 total minority medical school enrollments rose from 1,178 of a total enrollment of 37,690 to 4,524 of a total 55,818. AAMC, Medical School Admission Requirements 1977-78 (1976).

[23] Associated General Contractors v. Altshuler, 490 F.2d 9, 17 (1st Cir. 1973).

classification in admissions but nonetheless invalidated the Cal-Davis special admission program on other grounds. Assuming that strict scrutiny of the Medical School Admissions program is constitutionally required, the state's interest in achieving its goals was in fact compelling. The court's determination that only upon a showing of a history of discrimination could the state's interest withstand strict scrutiny is without decisional support. While this Court has recognized that the ameliorative use of race meets the test, it has not limited the application of the test to this isolated circumstance.

**(1) The Scope Of The Problem**

In *South Carolina v. Katzenbach,*[24] when this Court confronted a challenge to the constitutionality of the Voting Rights Act of 1965, it noted "[a]fter enduring a century of systematic resistence to the Fifteenth Amendment, Congress might well decide to shift an advantage of time and inertia from the perpetrators of the evil to its victims." It can certainly be argued that the several states are no more restrained in their attempts to voluntarily make good the promise of the Civil War amendments. Though the *South Carolina* case was decided more than a decade ago, the distance blacks have yet to travel to become and remain part of mainstream America is substantial.

In 1972 President Lyndon Johnson well articulated the scope of the black American's disadvantage. "[W]e cannot obscure this blunt fact, the black problem remains what it has always been, the . . . problem of being black in a white society. That is the problem to which our efforts must be addressed. To be black in a white society is not to stand on level and equal ground."[25] Though significant strides have

[24]383 U.S. 301, 328 (1966).

[25]Lyndon B. Johnson, Address upon the occasion of the dedication of the Lyndon Baines Johnson Library, Dec. 2, 1972.



been made, President Johnson's observation is substantially as telling for today as it was for the Fifties. The educational attainments for blacks between 1950 and 1975 did not dramatically change. The U.S. Census Bureau population statistics on education of blacks and whites 25 years or older are particularly revealing. The statistics indicate that 3.1%, 4.6%, 3.7% and 4.4% of blacks in the designated age group

**TABLE II**

Educational Attainment of Persons 25 Years and Older:
1950 Through 1975.

| | Total[1] Population | Less Than High School | High School Graduates | College 1 to 3 | College 4 and more |
|---|---|---|---|---|---|
| 1975 | | | | | |
| Total | 116,900 | 43,748 | 42,380 | 14,518 | 16,254 |
| Percent White | 89.0 | 84.3 | 91.6 | 91.5 | 92.8 |
| Percent Black | 9.5 | 14.6 | 7.1 | 6.9 | 4.4 |
| 1970 | | | | | |
| Total | 109.311 | 48,949 | 37,134 | 11,164 | 12,064 |
| Percent White | 89.8 | 85.4 | 92.9 | 93.6 | 94.3 |
| Percent Black | 9.2 | 13.7 | 6.3 | 5.8 | 3.7 |
| 1965 | | | | | |
| Total | 103,246 | 52,656 | 31,703 | 9,137 | 9,743 |
| Percent White | 90.0 | 86.0 | 94.0 | 94.6 | 94.1 |
| Percent Black | 9.2 | 13.1 | 5.3 | 4.9 | 4.6 |
| 1960 | | | | | |
| Total | 99,465 | 58,661 | 24,439 | 8,747 | 7,617 |
| Percent White | 90.1 | 86.8 | 94.4 | 95.1 | 95.4 |
| Percent Black | 9.9 | 13.2 | 5.6 | 5.0 | 4.6 |
| 1950 | | | | | |
| Total | 87,484 | 55,983 | 17,625 | 6,246 | 5,272 |
| Percent White | 90.7 | 87.9 | 96.3 | 96.2 | 96.6 |
| Percent Black | 8.9 | 11.7 | 3.4 | 3.5 | 3.1 |

[1] Numbers in Thousands.

SOURCE: U.S. Census. *Current Population Reports, Educational Attainment in the United States: March 1975*, Washington, D.C. 1976, Table D, p. 6.

had four or more years of college education in 1950, 1960, 1970 and 1975 respectively. It is significant that this creeping growth occurred during a period when federal and state desegregation and equal opportunity policies were being pursued.

Training beyond college, at the graduate and professional school level, in large measure determines entry into the middle and upper tiers of the occupational and class hierarchy of both the socio-economic structure and leadership positions of the nation. Yet American institutions have awarded tragically few graduate and professional degrees to blacks. At the beginning of the twentieth century, limited educational opportunity and racial discrimination had an obvious impact on blacks in the professions. For example, there were in 1900, 21,267 black teachers and professors, 1,734 doctors, 212 dentists and 728 lawyers.[26]

The first doctorate was awarded to a black American in 1876 when Edward Bouchet earned a Ph.D. in physics. Between that year and 1929 only 51 Ph.D's were awarded blacks by institutions in the United States. In succeeding years improvement was gradual. Racial discrimination, prevailing racist attitudes towards blacks and inferior prebaccalaureate education continued to affect adversely the number of degree recipients from 1944 to 1968. Though few studies on black doctorates cover this period, such research as does exist reveals that "less than one percent of all American earned doctorate[s] . . . were held by blacks."[27]

As the result of a Ford Foundation "Survey of Black American Doctorates" disseminated in 1970 and the work of the Institute for the Study of Educational Policy at Howard

[26]Tollett, "Black Lawyers, Their Education, and the Black Community," 17 How. L.J. 326 (1972).

[27]See generally, Fleming and Gill, Institute for the Study of Educational Policy (ISEP) Memorandum on Black Doctorates: Aggregate Data on Black Doctorates, 1876-1974 (1977); see also Minority Group Participation in Graduate Education, A Report with Recommendations of the Nat. Bd. on Graduate Ed. (Wash., D.C. 1976).



University it is possible to examine black doctorates of the post-*Brown* and Title VI era to determine their relative increase. The following table compares black and white doctorates through 1974.

**TABLE III**

Estimated number of black doctorates held through 1974.

| | To 1968[1] | 1969-72[2] | 1973[3] | 1974[3] |
|---|---|---|---|---|
| Total Doctorates Held (All Races) | 228,000 | 323,373 | 357,100 | 390,100 |
| Total Black Doctorates Held | 2,280 | 4,187 | 4,924 | 5,934 |
| Black % of Total Doctorates Held | 1.0 | 1.3 | 1.4 | 1.5 |
| Total Doctorates Conferred (All Races) | --- | 95,373 | 33,727 | 33,000 |
| Total Back Doctorates Conferred | --- | 1,907 | 737 | 1,015 |
| Black % of Total Conferred | --- | 2.0 | 2.2 | 3.1 |

SOURCES: [1] Ford Foundation. *A Survey of Black American Doctorates*, 1970, p. 3.

[2] U.S. Department of HEW, Office of Education, *Digest of Educational Statistics 1973*, Table 114, p. 100.

[3] Institute for Study of Educational Policy. *More Promise Than Progress*, 1977, Table 2-15, p. 101.

The picture for black and minority legal training is not significantly better than that of graduate education. The available pool of black lawyers has increased in absolute numbers but the percentage of black lawyers is not notably higher now than it was more than forty years ago. According to the estimates in 1930, black lawyers comprised less than

0.8 percent of the entire profession. Although figures vary, it appears that as compared with 159,735 white lawyers, there were between 1,175 and 1,230 black members of the bar.[28] In the words of a prominent black jurist of the period, despite the fact that arguments could be made that "there [were] enough white lawyers to care for the ordinary legal business of the country," there was a need for Negro lawyers. Ordinary legal business did not constitute the total work of attorneys in the United States then any more than it does now. "[W]here . . . pressure is greatest and racial antagonisms most acute . . . the services of the Negro lawyer as a social engineer [were] needed."[29] The required social engineering entailed advocacy of equal rights under the Constitution and arbitration of controversies within the context of the law. As social engineers and minority group members with interest in and sensitivity to the feelings, aspirations and oppressed position of the disadvantated poor and non-white, black lawyers have been a valuable resource to the nation. Black lawyers have served the republic through tireless efforts to promote "equal justice under law." The cases supported and litigated by the NAACP and The Legal Defense Fund are in large measure a testimony to the service of black lawyers.[30]

*Bakke* most directly assaults the principle and the hope of equal opportunity in the field of medicine. In this profession there is historical under-representation and a consequent need for greater black enrollment in medical schools. This is expressed most effectively in a recent study prepared by Elizabeth Abramowitz of the Institute for the Study of Educational Policy at Howard University. The results of Dr. Abramowitz's research follow:

> The need for more doctors as health providers sensitive to the needs of black patients and as medical researchers studying health problems related to social class and race has long been recognized. Beyond medical research, much of the federal involvement in medical schools has been aimed at removing manpower shortages by financing the training of doctors who promise to work in the underserved rural and urban areas . . ..
>
> In 1974, black doctors were 2% of all practicing doctors in the United States, while black citizens were 12% of all citizens. If the 6,600 black doctors were the only source of health service provided blacks, then there would be only one black doctor for every 3,400 black persons. Comparable figures for the 330,000 white doctors are one white doctor for every 557 white persons. Thus, the black doctor remains a limited resource in the medical delivery system for black and white patients alike.
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> * * *
>
> In 1969, the only two historically black medical schools in the United States, Howard University and Meharry Medical College, enrolled slightly less than one-half (46%) of all black medical students. But, by 1972, black enrollment in historically black medical schools accounted for only 15% of all black medical students. Between 1969 and 1972, the most significant gains in black enrollment in medical schools occurred on the campuses of predominantly and historically white medical schools.
>
> In 1969, blacks were 4% of the 10,401 first year medical students, but by 1974, blacks were 7% of the 14,763 first year medical students. This was a 146% increase in black first year enrollment between 1969 and 1974. But, most of this increase in black first year enrollment, like that of total black enrollment in medical school, occurred between 1969 and 1972. Indeed, increases in black first year and total enrollment since 1972 have been small. This downturn in the rate of increase in black enrollment in medical schools means a future decline in the increase in the stock of black doctors in the early 1980's.
>
> Much of the increase in black enrollment in medical schools between 1969 and 1972 can be attributed to increased recruitment by white medical schools at

[28]Houston, The Need For Negro Lawyers, 4 J. Negro Educ. 49, (1935).

[29]See McNeil, "Charles Hamilton Houston," 3 Black L.J. 123 (1974).

[30]Legal Defense Fund, "30 Years of Law Which Changed America" (1970).

historically black colleges, in addition to increased availability of financial aid for black students. Similarly, the decrease in black gains in medical school may be attributed to the decline in financial aid and recruitment of black medical students by white medical schools. Another factor contributing to the decline in the growth rate of black enrollment in medical school is the increased competition between medical schools and graduate schools for students in the physical and natural sciences.

* * *

The pool of black baccalaureates with degrees in the sciences is very small, thus both medical schools and graduate schools must directly compete for the same students. The recent increases in enrollment of blacks in graduate schools in the natural and physical sciences in part reflects a siphoning off of students who might otherwise consider medical school. This increase in graduate school enrollment is in part paid for by a decrease in medical school enrollment. The long term supply problem of black students has to be addressed by a general increase in access of blacks to college, a general decrease in black attrition in high school, and improved high school science curricula at inner city schools.[31]

**(2) The Compelling Need for Remediation**

The California court determined that the state interest was insufficient given the University's stated bases for employing a race conscious admission process. The question to be answered is not whether the University has sufficiently stated its interest but whether there in fact exists sufficient warrants to buttress its administrative regulation. Scrutiny on this review ought not be limited to the public announcements of the University as to why it took the action it did, nor to the

[31] E. Abramowitz, "Black Enrollment in Medical Schools," in *More Promise Than Progress* (1977) (forthcoming publication of Inst. for the Study of Educ. Policy at Howard University).



proofs submitted at trial below. So fundamental a question as is here involved requires a searching analysis to determine if any adequate basis for the regulation exists. Such an inquiry would indeed uncover clear support for the University's special admission program.

Not only is there a necessity to diversify professional education and the delivery of services which as noted above are adequate bases in their own right for sustaining the Cal-Davis program, but of equal necessity is the state's need to make the benefits of the society available to a broader cross section of its members. It is no chance occurrence that black and other minority educational attainments are low and that they disproprotionately occupy the lower paying jobs and acquire smaller stakes in the economic life of this country. The tranquility and stability of our society is directly tied to the equity and balance with which the benefits and rewards of a productive and contributing life are dispensed. A denial of these integral aspects of "the good life" or influencing their apportionment on the basis of minority status can only lead to disquiet, discord and social unrest. The need for remediation of the root causes for such ferment are as compelling as the need for social justice. Bringing into the fold those who were and remain victims of "time and inertia" is critically important, indeed compelling in every sense of the word.

**B. An Alternate Equal Protection Analysis.**

Although Bakke brings this action as an individual it is clear that the system he challenges allegedly discriminates against a large, diverse, and amorphous class, the American who is neither Black, Hispanic, Filipino, nor Indian. It is worthy to note that the class can only be described in terms of non-exclusiveness and this raises the question whether a class exists at all for the purposes of equal protection analysis. But assume *arguendo*, the existence of a class. Is that class

saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection? This is the showing that is required in *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973). It certainly could be that Bakke's class is so large it encompasses the group who allegedly has discriminated against him. To give respondent the benefit of strict scrutiny of a program devised by the majority group of which he is a member, is to hinder the majority in its effort to remediate past wrongs against the minority.

Assuming then, that the strict scrutiny is inapposite, numerous factors must be examined to determine the appropriate standard of review. Since the facts of the case represent an evolution in societal methods of dealing with minority disadvantagedness, it would be appropriate for the Court to evolve standards, consonant with its past logical expositions, which may be applied to the ameliorative or inclusionary racial classifications.

The beginning point of the analysis is a determination of the impact of the preferential program on preferred groups: (1) What benefits do they derive? (2) Are the beneficiaries disproportionately benefited in light of their number? (3) Are other groups disproportionately excluded? The second determination is the impact on the non-preferred group: (1) Is the non-preferred group stigmatized by the actions? (2) Is this group as such limited in its options or prevented from exericsing any options as a result of the program?

The focal point is on the group effect as opposed to the individual determent which preoccupies the traditional anti-discrimination approach to equal protection. In its standard application, discrimination against any group is a denial of equal protection rights depending on the rationality of the means to the end. The strinency of the test depends on the nature of the interest impinged: fundamental interest or not. In recent years this Court has moved away from the two



tiered analysis of an earlier period to a more "intensified means scrutiny."[32]

In 1975 Professor Owen M. Fiss first proposed an alternate equal protection analysis at the Institute for Advanced Study[33] based on the group-disadvantaging principle (GDP). As he concedes, application of the principle will in many instances produce the same result as the antidiscrimination interpretation, but the GDP has greater versatility and wider application in the arena of state action affecting minority groups.

It should be stressed that the application of the group-disadvantaging principle is proposed as a criterion, a means to assist in consideration of the ultimate issue in this action; the issue ultimately being the extent to which the courts will support state action to benefit the welfare of certain disadvantaged groups.

In the GPD theory, the term "group" refers to social groups, or natural classes of people, which exist throughout society, irrespective of legislative or other artificial classifications. A social group may be seen as having the following characteristics:

a. It is an entity, with a distinct existence and identity apart from the composition of its individual members at any point in time. The group may be referred to in conversation, or in the press, without reference to any individual and the listener (or reader) will know from experience, what group as being referred to, and that it has unique characteristics.[34]

b. It has a condition of interdependence. Individuals identify themselves as members of the particular group; their identity is, to a great extent, determined by membership in the group,

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[32]See generally Gunther, "The Supreme Court 1971 Term; "A Model for a Newer Equal Protection," 86 Harv. L.R. 1 (1972).

[33]The concept is further refined in his 1976 publication. Fiss, "Groups and the Equal Protection Clause," Philosophy and Public Affairs 107 (1976).

[34]Id. at 148.

social status is linked to the status of the group, and one does not become a member of, or leave the group by voluntary, or conscious action. There is a uniformity of shared experience which gives the individual a unique perspective as the member of that group.[35]

The Equal Protection Clause was passed in order to ensure the protection of, and prevent the persecution of, socially disadvantaged groups in general, and individual group members in particular. Blacks are the prototype of the protected groups;[36] but other disadvantaged groups are surely entitled to protection.[37] The court may develop variable standards of protection based upon the relative disadvantage of the group, the duration of the disadvantage, the prospective assimilation of the group, or the nature of interest affected by the contested state action.[38]

The issue then becomes whether the contested action is one which aggravates the existing disadvantage of the group or is one which attempts to ameliorate the existing disadvantagedness in order to achieve the goal proposed by the Equal Protection Clause: group equality. The state action should be viewed from the perspective of its impact on the status of the group.

An examination of the recent *United Jewish Organizations of Williamsburgh*[39] decision will show the de facto use and

[35]Id. The involuntary membership requirement is not specifically stated, but may be inferred, and is appropriate.

[36]Fiss, at 155.

[37]*Hermandez* v. *Texas*, 347 U.S. 475 (1954) (holding that Hispanics constitute and identifiable class for purpose of the Fourteenth Amendment). See also, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938). "Prejudice against discrete and insular minorities may be special conditions, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ."

[38]Compare, dissent of Marshal, J., *Rodriguez* v. *San Antonio Ind. School Dist.*, 411 U.S. 1, 70 (1973).

[39]United Jewish Organizations of Williamsburgh v. Carey, —U.S.— (1977).



application of the group-disadvantaging principle in a recent equal protection analysis. Part III of the principal opinion examines the constitutional permissibility of a plan requiring 30% of the voting districts to contain 65% non-white population, in order to achieve a substantial non-white voting majority in those districts. The Fissian group here is comprised of "non-white voters." Although the court does not mention the group-disadvantaging proposition, it is clear in Part III of the opinion that the court has affirmed the Attorney General's plan as necessary in order to (a) alleviate a previously existing group disadvantage, and (b) prevent the recurrence of a group disadvantage.

The first premise must be that underrepresentation of a group in the political process is a disadvantage to that group. This would seem to be established beyond a doubt (*Gomillion v. Lightfoot*, 364 U.S. 339 (1960), *City of Richmond v. United States*, 422 U.S. 358 (1975)). Likewise, underrepresentation of a group in the medical and legal profession is a disadvantage to that group. It correlates with the quality of professional services received by the group. In addition, members of the group are prevented from aspiring to the professions, because, as a practical matter, they would be excluded by the use of traditional screening criteria.

The second premise in *Williamsburgh* is that, without the N.Y. Plan utilizing racial criteria, the group would be underrepresented politically. This is established by showing that without employing the racial criteria in the districting process, the non-white franchise would become diluted and ineffective, thus changing population patterns require a redrawing of district lines. Likewise, without the plan utilized by Cal-Davis or another plan of similar design and impact, such as those reviewed and approved by the state court in *DeFunis v. Odegaard*, 82 Wash. 2d 11 (1973), and *Alevy v. Downstate Medical Center*, 438 N.E.2d 537, the group would be underrepresented in the medical profession. As noted above, the alternate means suggested by the California

Supreme Court are inappropriate to achieving required diversity.

The court then concludes that, in order to prevent a dilution of non-white voting strength, it is permissible to consider race or ethnicity as a factor; relying principally on the non-retrogression principle of *Beer v. United States*, 425 U.S. 130 (1976), and the "constitutionally valid statutory mandate of maintaining nonwhite voting strength."[40] The Court further states:

> The constitution permits it [Kings Co.] to draw district lines deliberately in such a way that the percentage of districts with a non-white majority roughly approximates the percentage of non-whites in the county.[41]

In the case at bar there is no attempt on the part of the medical school to achieve a percentage quota based on the black and Chicano population of California. The program is, however, an attempt to deliberately achieve a minority participation in a profession from which there has been exclusion in the past. As in *Williamsburgh* where a race or ethnic group has been excluded in the past, even if not through conscious design, race or ethnicity may be considered for the purpose of fostering inclusion of that group. In Part IV of the Court's opinion and independent aspect of the group-disadvantaging theory was invoked. This Court stated:

> It is true that New York deliberately increased the non-white majorities in certain districts in order to enhance the opportunity for election of non-white representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the country, and the plan did not minimize or unfairly cancel out white voting strength.[42]

[40] *United Jewish Organizations of Williamsburgh* v. *Carey*, (Sl. op. at 17).

[41] Id. at 19.

[42] Id.



It seems, then, that there has been no showing of group disadvantage with regards the group of "white voters."

Bakke has made no showing of any scheme to fence out white medical school applicants. The effect on him would have been the same had the class been reduced to 84 for budgetary or other reasons. Nor has Bakke shown any impairment on the part of whites as a group to participate in the medical profession. The respondent is an individual alleging harm as an individual rather than a group or individual alleging harm to the group of which he is a member.

Yet, in both *Williamsburgh* and here, the plaintiff alleged perferential group treatment. The Court's observation in the voting rights situation is equally apposite here:

> "... the individual voter ... has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote. Some candidate, along with his supporters, always loses."[43]

## III.

## THE THIRTEENTH AMENDMENT AND STATUTES PASSED IN FURTHERANCE THEREOF AUTHORIZE THE ELIMINATION OF THE VESTIGES OF SLAVERY AND RACIAL DISCRIMINATION BY THE USE OF MEASURES GRANTING PREFERENTIAL TREATMENT TO BLACKS.

In sum we contend that the Thirteenth Amendment is an alternative source of authority to the Fourteenth Amendment for upholding the constitutional validity of the admission program in the case at bar.

Pursuant to its Thirteenth Amendment powers to determine the badges and vestiges of slavery and mandate their

[43] *United Jewish Organization of Williamsburg, Inc. v. Carey, --U.S.-- --(1977).*

elimination, Congress has reasonably acted to eliminate racial discrimination in education. The regulations issued by the Executive Branch under authority delegated to it by the Congress in the Civil Rights Act of 1964 mandate or permit the preferential admission program involved in the case at bar. Blacks as the primary, intended beneficiaries of the Amendment and its progeny of statutes can properly be preferred in the awarding of scarce educational opportunities in these circumstances as a means of eliminating the vestiges of slavery.

**A. Scope of the Amendment.**

The Thirteenth Amendment to the U.S. Constitution, adopted in 1865, provides:

> Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

The congressional debates over the Amendment make clear that many, if not all, its proponents intended that more than the mere institution of slavery was to be abolished. As this Court declared in *Jones v. Mayer*, 392 U.S. 409, 439 (1968) (quoting in part from the *Civil Rights Cases*, 109 U.S. 3, 20 (1883)) the Amendment:

> "By its own unaided force and effect abolished slavery, and established universal freedom." Whether or not the Amendment *itself* did any more than that – a question not involved in this case – it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."



It is also clear from the Congressional debates that the denial of equal educational opportunities was within the intended purveiw of the Thirteenth Amendment itself.

Senator Trumbull declared to the Congress after its passage:

> With the destruction of slavery necessarily follows the destruction of the incidents to slavery. . . . *Those laws that did not allow him (the colored man) to be educated, were all badges of servitude made in the interests of slavery.* They would never have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also. *Cong. Globe*, 39th Congress, First Session (1866), at p. 322. (Emphasis added.)

Likewise Senator Wilson stated in Congress:

> We must see to it that the man made free by the Constitution of the US . . . is a free man indeed; . . . *that he can go into schools and educate himself and his children* . . . and that he . . . is protected bv iust and equal laws of his country. *Cong. Globe*, 39th Congress, First Session (1865) at p. 111. (Emphasis added.)

That equal educational opportunity was a proper purpose of Congressional action under the amendment is further evidenced by this Court's recent holding that legislation pursuant to the Amendment, namely 42 USC 1981, properly prohibited racial discrimination in admissions to private schools in that such action restricted black people's right to make contracts. *Runyon v. McCrary*, 420 U.S. 160 (1976).

The force and effect of the Amendment continue into the present and Congress is not without authority to remedy the effects of slavery, the subsequent system of legalized racial segreation and the present evil of institutionalized racism in America. As Justice Douglas observed less than a decade ago in his concurring opinion in *Jones*:

> Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. 392 U.S. at 445.

And in a line of cases since *Jones v. Mayer* this Court has upheld the continuing vitality of the Amendment.[44]

**B. Congressional Action Pursuant to the Amendment.**

The Congress has enacted a number of statutes to implement the Amendment's purposes. Of special significance to the case at bar are the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1866, and Title VI of the Civil Rights Act of 1964.

**(1) The Freedmen's Bureau Act.**

The Freedmen's Bureau was established in the closing days of the Civil War in exercise of the Congress' war powers.[45] Its life was extended after the war and its mission expanded in reliance upon Congress' powers under the 13th Amendment's Enabling Clause (Section 2).[46] Although the Bureau did in fact assist some improverished whites in the former Confederate states, its primary purposes and efforts were directed at assisting the emancipated slaves who were, of course, Blacks by definition. This use of the 13th Amendment as constitutional authority for programs to provide educational and other opportunities specifically for blacks was probably the first example of Federal preferential treatment of blacks as a means of promoting civil equality between the races.

In contrast to the first Freedmen's Bureau act which, in the main, established a Bureau "for the relief of Freedmen and Refugees' and stipulated that it would "control . . . all subjects

[44]E.g., *Tillman* v. *Wheaton* - Haven Recreation Assn. 410 US 431 (1973); *Johnson* v. *Railway Express Agency, Inc.* 421 US 454 (1975), *Runyon* v. *McCrary* 427 US 160 (1976).

[45]13 Stat. 507 (1865)

[46]14 Stat. 176 (1866)



relating to refugees and freedmen,"[47] the second act called for special attention to the subject of freedmen's education.[48] The language of two sections of the second Freedmen's Bureau Act stresses Congressional interest in the promotion and supervision of the education of the freedmen through this established agency:

> Section 12: And be it further enacted, that the commissioner of this bureau have power to seize, hold, use, lease or sell all buildings and tenements, and any lands pertaining to the same, or otherwise formerly held under color of title by the late so-called confederate states, and not heretofore disposed of by the U.S. and any buildings or lands held in trust for the same by any person or persons, and to use the same or appropriate the proceeds derived therefrom to the *education of the freed people*; and *whenever the bureau shall cease to exist, such of said so-called confederate states as shall have made provision for the education of their citizens without distinction of color* shall receive the sum remaining unexpended of such sales or rentals, which shall be distributed among said state for educational purposes in proportion to their population.
>
> Section B: And be it further enacted, that the commissioner of this bureau shall at all times co-operate with private benevolent association of citizens in aid of freedmen, and with agents and teachers, duly accredited and appointed by them, and shall hire or provide by lease buildings for purposes of education. (Emphasis added.)

Moreover, the implementation of Congressional directives under the Act included particular support of Howard University, an historically black institution. Significantly, when, in 1870, the use of Bureau funds to support Howard was questioned, a House Committee clarified the Congressional position on federal aid for freedmen's higher education:

[47]13 Stat. 507 (1865)

[48]14 Stat. 176 (1866)

> *If one of the very purposes of the Bureau was to educate freedmen*, and if the university was established for that purpose, the expenditure was not improper. The reports of the general school superintendent of bureau which were put in evidence, show clearly that the great and earnest effort of the commissioner was to inaugurate a system of common school education among the freedmen. A necessary adjunct and indispensible precedent condition to this plan was to establish a university that could give life and energy to these widely scattered schools. The necessity of preparing and qualifying teachers for future use among the freedmen justifies the expenditure. (Emphasis added.)[49]

Professor Benjamin Quarles has aptly summarized the overall mission and work of the Bureau:

> Headed by an able commissioner, General O. O. Howard, the Freedmen's Bureau offered a variety of services. It had a health program, distributing a total of some twenty-one million rations, establishing forty hospitals, and treating nearly half a million cases of illness over its seven year existence. The Bureau acted as a legal guardian to the freedmen, adjudicating many cases in its own semi-military courts, where technicalities might be brushed aside. Though the Bureau was placed in control of confiscated and abandoned lands, most of the acreage at its disposal was inferior and undesirable. President Johnson's pardon of many (white) planters had enabled them to reclaim their estates and to protect the former slaves in their negotiations with landowners, the Bureau drafted labor contracts calling for a fair wage. The Bureau was empowered to enforce such contracts, becoming in effect the first mediating agency between capital and labor in America.
>
> The Bureau also established over 4,000 schools, from the elementary grades through college, charging no fees and often furnishing free textbooks. Nearly a quarter of a million former slaves received varying amounts of education through such efforts. – B. Quarles. *The Negro in the Making of America*, First Edition 1964 at p. 138.

[49]Committee on Education and Labor, House Report No. 121, 41st Congress (1870) p. 7.



**(2) Civil Rights Act of 1866.**

This statute, among other things, prohibited racial discrimination in respect to property rights (14 Stat. 27, 42 USC Section 1981) and to the right to make and enforce contracts (13 Stat. 27, 42 USC Section 1981). Passed under the Thirteenth Amendment's Enabling Clause For the purpose of eliminating several of the badges and incidents of Negro slavery, the above mentioned provisions were thought to be dead letters until this Court upheld their constitutional validity in *Jones v. Mayer*, 392 U.S. 409 (1968) in regard to 42 USC 1982; and in *Tillman v. Wheaton – Haven Recreation Assn.*, 410 U.S. 431, 439-440 (1973) in regard to 42 USC 1981.

**(3) Title VI of Civil Rights Act of 1964.**

This provision, among other things, prohibits discrimination based on race, color, or national origin in Federally assisted programs. Regulations issued pursuant to this provision, set forth and discussed elsewhere in this Brief, mandate affirmative action to remedy the effects of past discrimination and permit such action in circumstances, such as those present in the case at bar, where there has been no showing of past discriminatory intent in affected programs. In a school desegregation case this provision has been held to be a valid exercise of Congress' powers under the Thirteenth Amendment. *U.S. v. Jefferson Cty Board of Education*. 372 F.2d 836 (5th Cir. 1966) decree corrected 380 F.2d 385 (5th Cir. 1967); cert. den. 389 U.S. 840 (1967).

The court held:

> Title VI of the Civil Rights Act of 1964, therefore, was not only appropriate and proper legislation under the Thirteenth and Fourteenth Amendments; it was necessary to rescue school desegregation from the bog in which it had been trapped for ten years. *Ibid* at 856.

**C. The Racial Focus of the Amendment.**

That blacks were the primary, intended beneficiaries of the Amendment and its implementing statutes is clear from a look at the evil these measures addressed. The express purpose of the Amendment was the abolition of slavery. Only blacks in this country were the systematic victims of this previously sanctioned institution.

We do not argue that whites have no rights under the Amendment. However, it is fair to say that whites were the incidental beneficiaries of the rights accorded blacks by the Amendment and the laws pursuant to it.[50]

The special focus of the Amendment and its implementing laws on securing rights for blacks is also made clear by the remarks in Congress of Senator Trumbull, chief architect of the Amendment and the Civil Rights Act of 1866, as quoted in the *Jones* decision:

> I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. 392 U.S. at 440.

[50]We do not argue that whites have no rights under these measures. We are mindful of this Court's recent opinion in *McDonald* v. *Santa Fe Trail Transportation Company*, 472 U.S. 273 (1976) construing 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964. That holding is inapposite to the case at bar. Title VI of the latter Act and its mandate for affirmative action, unlike the case at bar, were not involved. The discrimination against whites in employment, which was condemned in that opinion, was, pure and simple, invidious racial discrimination. The apparent, preferential treatment accorded the Black employee involved, had no justification in terms of the ameliorative use of race as a means of carrying out the purposes of the Thirteenth Amendment.

In a footnote to its opinion this Court itself distinguished that case from one involving an affirmative action program:

> Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, see Brief for Respondent Santa Fe 19 n. 5 and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted. Cf. Brief for United States as *Amicus Curiae* 7 n. 5. 472 U.S. 273 n. 8 at 280-281 (1976).



The Jones decision went on to declare:

> Surely Senator Trubmull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation. 392 U.S. at 440.

It is a sad commentary on our constitutional history that the original promise and purpose of the Amendment were thwarted by, among other things, decisions of the U.S. Supreme Court, for example, the *Civil Rights Cases*, 109 U.S. 3 (1883) holding that the Congress had no power under the Amendment to prohibit discrimination against blacks in public accommodations as a badge or incident of slavery; and *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) holding that discrimination against blacks enforced by a state in transportation facilities was constitutional under the 13th and 14th Amendments and, in dictum, sanctioning mandatory segregation in the public schools.

Both of these decisions were attacked by Justice Harlan in dissenting opinions. His dire prediction of the impact of the *Plessy* decision on the goal of racial equality under the law bears quotation here:

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both

require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana. *Plessy v. Ferguson, supra*, at 560.

The distinguished historian Dr. John Hope Franklin has documented the prescience of Justice Harlan's opinion in the *Civil Rights Cases* and the causal impact of court decisions in granting license to whites to engage in legalized subjugation of blacks in the century since the 13th Amendment was passed:

> The decision in the Civil Rights Cases was an important stimulus to the enactment of segregation statutes. It gave the assurance the South wanted that the federal government would not intervene to protect the civil rights of Negroes. The decision coincided, moreover, with a series of political and intellectual developments that greatly accelerated the program of segregation. In the eighties several Southern governments were embarrassed by financial scandals, and some of them outstripped the Reconstruction governments in defalcations and pilfering. Meanwhile, the agrarian unrest induced by widespread economic distress frightened the conservatives and forced them to adopt extreme measures in order to regain the leadership which in some states they had temporarily lost to white and Negro Populists. Distressed by the possibility of a strong new party composed of white and Negro farmers and workers, they dominated the Negro vote where they could and expressed grave fears of "Negro domination" where they could not. Thus, the magical formula of white supremacy, "applied without stint and without any of the old reservations of paternalism, without deference to any lingering resistance of Northern liberalism, or any fear of further check from a defunct Southern Populism," gained ascendancy in the final decade of the nineteenth century.



> These were the years that witnessed the effective constitutional disfranchisement of Negroes by such devices as understanding clauses, grandfather clauses, and good conduct clauses. They also saw the launching of an intensive propaganda campaign of white supremacy, negrophobia, and race chauvinism, supported by a sensational and irresponsible press that carried lurid stores of alleged Negro bestiality. New waves of violence broke out, with increased lynching of Negroes, unspeakable atrocities against them, and race riots. Concurrently, and at a "higher level," the literary and scientific leaders of the South wrote numerous tracts and books designed to "prove" the inhumanity of the Negro. In this climate segregation took a giant step toward a fully developed white supremacy apparatus. J. H. Franklin, quoted in Bell, *Race, Racism* and *American Law* (1973) at p. 203.

If the Thirteenth Amendment empowers Congress to legislate against the badges and vestiges of slavery, does it not permit Congress to require or permit affirmative action favoring blacks, long denied their rights, over whites in the awarding of scarce educational opportunites? It has been held that Title VI of the Civil Rights Act of 1964 is a valid exercise of Congress' power under this amendment (*U.S. v. Jefferson Cty. Bd. of Educ.*) supra, and as we argue elsewhere in this Brief, Title VI permits if not mandates the special admissions program at issue in the case at bar.

How is the promise of the Thirteenth Amendment ever to be fulfilled if the reach of congressional power under it is to be limited by the claims of whites (such as respondent in the case at bar) that they are being denied equal protection of the law, under the Fourteenth? There is ample authority that this latter amendment was intended to go beyond the Thirteenth in protecting blacks from discrimination. Cannot Congress now remedy judicial obstruction of the intendment of the Thirteenth Amendment, for almost a century after its passage, by rational legislative means? As it is argued elsewhere in this brief the granting of scarce opportunities for professional education necessarily involves the denial of opportunities to many people who meet minimal qualifications. Should whites

be permitted to maintain their present advantages over blacks in qualifying for such opportunities in the face of the preferential treatment historically given to whites by Federal and State governments aided and abetted in part by Federal and State constitutional doctrine only recently rejected by the Courts? Such a limitation on the reach of the Thirteenth Amendment and a construction of "equal protection" under the Fourteenth Amendment denudes them of any efficacy in remedying the legacy of slavery and segregation, and the pervasive institutional racism so roundly condemned by a variety of legal, scientific and other authorities. As the late President Lyndon B. Johnson recognized in his speech at Howard University, in view of our history of racism it is not enough to assure equality of opportunity before the law, for whites begin the race to achievement in our society with an invidious headstart resulting from their preferred position under the law until recently. He maintained that society should be about promoting equality of results, as well as opportunity, between blacks and whites.[51]

Having rejected the doctrine of separate but equal enunciated in *Plessy v. Ferguson* which, despite its euphemistic language, enshrined the legal subjugation of Blacks, we face a cruel irony if we adopt a construction of the equal protection clause that requires absolute governmental neutrality in all circumstances toward the races in their presently unequal positions. Such a move will, like *Plessy*, guarantee the perpetuation of preferential access of whites to the benefits and rewards of our society. The cycle of history repeating itself would be complete. And the promise of true civil equality between the races would remain forever a mirage. Just as the *Brown*[52] Court held the doctrine of separate but equal is a mirage and unconstitutional, we respectfully submit that this Court should declare that equal opportunity is similarly a mirage unless it is recognized that preferred

[51] N Y Times, June 5, 1965, at 14, Col. 2 (City ed.).

[52] *Brown* v. *Board of Education Topeka, supra.*



treatment may be necessary for blacks who are less qualified than whites in terms of criteria established by institutions that have historically excluded or discriminated against blacks. Without such recognition the damage done by prior judicial decisions in obstructing the more than century-old promise of legal equality, made with the passing of the Thirteenth Amendment, will never be repaired.

Elsewhere in this brief the argument is made that the Fourteenth Amendment does not forbid the use of race as a classification in eliminating prior racial discrimination against blacks and, as Professor Boris Bittker has ably argued, that amendment would not forbid an even more extensive degree of preferred treatment of blacks, namely, reparations to blacks today for the past injustices of slavery and legally mandated discrimination.[53]

We conclude, therefore, that the Thirteenth Amendment and the measures adopted to implement it authorize the use of the preferential admission program at Davis.

## IV.

## TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 REQUIRES OR PERMITS THE CAL-DAVIS SPECIAL ADMISSION PROGRAM.

In our view, Title VI of the Civil Rights Act of 1964,[54] and the regulations thereunder[55] provide an adequate legal basis for the admissions program at Davis which is under review in this case. Section 601 of Title VI provides that no person shall be discriminated against on the basis of race, color or national origin in any program receiving federal financial assistance. Section 602 authorizes the various departments and

[53] Boris Bittker, *The Case for Black Reparations* (1973).

[54] 42 U.S.C. 2000d (1970), hereinafter cited as Title VI.

[55] 45 CFR part 80 (hereinafter cited as the Title VI regulations).

agencies administering programs of federal financial assistance to adopt regulations, which become effective upon presidential approval, to effectuate the purpose of the Title. Pursuant to Section 602, the Department of Health, Education and Welfare adopted Title VI regulations which have application to the instant case and, in our view, require reversal of the decision of the Supreme Court of the State of California.

The substantive portion of the Title VI Regulations, 45 CFR 80.3, is in three main parts. The first part, Section 80.3(a), restates the mandate of Section 601. Section 80.3(b) contains the latter two parts, which can be characterized as the prohibition against intentional discrimination, or disparate treatment of persons, 80.3(b)(1), and the prohibition against "impact" discrimination (administration which has the effect of discrimination), 80.3(b)(2). In addition, the substantive portion of the regulations contains an affirmative action section, 80.3(b)(6), and the illustrative application section, 45 CFR 80.5, contains two provisions, 80.5(i) and (j), which interpret those affirmative action provisions.

Cal-Davis' initial admissions procedures violated the substantive regulations prohibiting administration with discriminatory effect; thus Cal-Davis was *required* to establish its special admissions program; and, finally, even if Cal-Davis was not required to establish its program, it was clearly permitted to do so under the permissive affirmative action provision.

### A. Cal-Davis' Prior Admissions Practices Violated the Substantive Title VI Regulations.

Section 80.3(b)(2) of the HEW Regulations provides that a recipient of federal financial assistance,

> determining . . . the class of individuals to be afforded an opportunity to participate in any [program to which the regulation applies], may not . . . utilize criteria or methods of administration which have the effect of . . . *defeating or substantially impairing the objectives of the program* as respect individuals of a particular race, color, or national origin. (Emphasis added)



The facts set forth in the record demonstrate that Cal-Davis' original admissions criteria and procedures, as administered, were in violation of the above provision. For example, in 1968, the first year of operation of the Davis Medical School, the use of those criteria and procedures resulted in a virtually all-white student body. (Court Transcript, hereinafter cited as Ct, at 68). Thus the terms and purpose of the regulation were being defeated in the most complete way, with respect to minorities, by the admissions process at Davis, a school which receives federal financial assistance. How can the purposes of medical education be accomplished with respect to minorities if there are no minorities enrolled? (Title VI says "no person shall be excluded from participation in, denied the benefits of, or subjected to discrimination under any [jurisdictional activity]."") In a recent letter on the related question of the scope of permissible voluntary affirmative action, the Office of Civil Rights of the Department of Health, Education and Welfare, which has the administrative responsibility for enforcing Title VI in the area of Higher Education, stated:

> . . . If the use of these traditional measures has a disproportionate effect in rejecting identifiable racial or ethnic applicants, the institution has a responsibility to *validate* the tests as a predictor of academic performance or other appropriate academic purpose. (Emphasis added.)[56]

The term "validate" as employed here refers to the Title VII[57] analogue to 80.3(b)(2), the Testing and Selection Guidelines:[58] both are aimed at insuring that "artificial"

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[56]Letter dated January 19, 1977 from Martin Gerry, Director, Office for Civil Rights, to Dean Charles J. Meyers, Stanford Law School, p. 2-3.

[57]Civil Rights Act of 1964, 42 U.S.C. 2000-e (1970), hereinafter referred to as Title VII.

[58]29 C.F.R. §1607.1 - 1607.14.

barriers, even if neutral on their face, do not have the effect of restricting opportunities to minorities.

On the question of whether Title VII is an appropriate analogy in this case, we believe it should be viewed *in pari materia* with Title VI on this question. Section 601 of Title VI provides that "No person" shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program. . . ." Section 703(a) of Title VII declares it to be unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his . . . employment, because of such individual's race, color, religion, sex or national origin." Except for differences made necessary by the difference in coverage and subject matter, there is no material difference in the language setting forth the prohibited behavior.

If anything, the Court should give greater deference to the regulations under Title VI than the weight it has given to the EEOC's guidelines interpreting Title VII since the Title VI regulations were adopted pursuant to a specific grant[59] of substantive rulemaking authority, of which one condition was approval by the President.

To apply the Title VII analogy, it would be a violation of the act for an employer (university medical school) to use selection (admissions) criteria which had the effect of excluding minorities if such criteria were not reasonably related to the requirement of the job.[60] The criteria might be related to the requirements, when applied to whites, and yet not demonstrated to have that characteristic when applied to minorities.[61] Even if the criteria in question were shown to

[59]Title VI, section 602.

[60]29 C.F.R. 1607.4(c). See, e.g., Griggs v. Duke Power, 401 U.S. 424 (1971)

[61]29 C.F.R. §1607.4(a).



have some reasonable relationship to job requirements, when applied to minorities, their use would be a violation of the Act if there was a less discriminatory alternative method of selection.[62]

Unlike the EEOC guidelines, the Title VI regulation does not specifically provide a "business necessity" defense, perhaps because it is aimed at the various programs for delivery or public services – education, health care and the like – which receive federal financial assistance, rather than at employment *per se*. However, in our view the concept of "defeating or substantially impairing the objectives of the programs" performs an equivalent function: If a criterion which substantially excluded minorities was necessary to the operation of the program, its use would not violate the regulation. But there is no indication that such is the case here; the history of the special admission program shows that use of the "standard" procedures for admission is clearly *not* the only way to get quality medical students.[63]

As the HEW letter quoted above goes on to state:

> As long as the goal of the admission process is to predict most accurately the relative promise of all applicants in terms of the standards for admissions generally established by the institution, criteria used to measure applicants may be expanded, if necessary, to achieve this objective. . . . It is particularly appropriate to broaden the criteria where the educational development of an applicant has been hindered or restricted by severe economic deprivation or racial discrimination. In such cases, admission may be warranted on the basis of relative promise even where all applicants who are admitted may not have the highest academic indices.

[62]29 C.F.R. §1607.3.

[63]CT at 67.

### B. Cal-Davis Was Required To Adopt A Special Admission Program.

Once a violation of Section 80.3(b)(2) has been identified, what is required? Section 80.3(b)(6)(i) provides: "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color or national origin, the recipient must take affirmative action *to overcome the effects of prior discrimination.*" (Emphasis added.)

The questions that arise in applying this provision to the situation at Cal-Davis are: Does the provision come into play only in the event of a formal finding of a past discrimination, and what is the meaning of the term "affirmative action" as used in the provision?

First, we believe that a formal finding of a violation is not necessary for the requirement to come into play. The rationale for that interpretation would be that the mandatory provision was included *only* to make clear that upon a finding, under Title VI procedures, of a violation of the substantive provisions, it would not suffice to discontinue the discriminatory practices, but the recipient would also be required to remedy the prior conduct. However, under the regulatory scheme, which has been in place since the implementation of Title VI began in late 1964,[64] in the case of any violation of a requirement established by a regulation of Title VI, the recipient would be subject to termination of assistance, after a hearing, unless it developed a plan acceptable to the Office for Civil Rights for coming into compliance.[65] Accordingly, 80.3(b)(6)(i) would be mere

[64]45 C.F.R. Part 80 was adopted in its initial form in December, 1964. 29 Fed. Reg. 16298. 80.3(b) (6) was published for comment after several years of staff work, on December 9, 1971, 36 Fed. Reg. 237, and adopted without material changes, on July 5, 1973, 38 Fed. Reg. 17979.

[65]See Title VI, Section 602; Title VI Regulations, Sections 80.7(d) and 80.8(a).



surplusage if it only came into play where there was a formal finding of discrimination. It is much more likely that the provision was adopted in response to the wave of institutional self-analysis of the late 1960's, to strengthen the hand of those administrators within the various institutions who perceived a *moral* obligation to take remedial action in light of findings of the self-analysis.[66] (A familiar theme in civil rights compliance is the administrator who says, "This will be great for the institution, but I need to be able to say that we *have* to do it.")

The illustrative example in the Title VI regulation, Section 80.5(i), is instructive:

> In some situations, even though past discriminatory practices have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required under §80.6(d)[67] . . . have failed to overcome these consequences, it will become necessary . . . for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subjected to

[66]As discussed below, in this view the "permissive" provision, 80.3(b)(6) (ii) would come into play if there was an institutional willingness to take measures to increase minority participation in situations where the facts were not clear, the institution was not willing to concede a violation or there was, in fact, insufficient experience with minority applicants to reach any conclusion with regard to the discriminatory effect of the admissions process.

[67]80.6(d) requires recipients to make available to beneficiaries and others information about the applicability of the Title VI regulations "in such manner, as the responsible Department official finds necessary . . . The Department has not provided any indication to recipients or others regarding the manner in which such information should be provided. In all likelihood, it has been limited to boilerplate affirmations of nondiscrimination policy in recruitment literature and other descriptions of institutional policy circulated to the general public.

discrimination.[68] This action may take the form, for example, of *special arrangements for . . . making selections which will insure that groups previously subjected to discrimination are adequately served.* (Emphasis added.)

The term "affirmative action" has been used with somewhat different meanings in a number of civil rights related provisions. Title VI itself does not contain the term, but Title VII in Section 706(g) provides that upon finding of a violation of the anti-discrimination provisions of the Title, a court may order an employer to take "affirmative action" to correct the effects of the violation, including hiring.[69] Executive Order 11246 requires persons with contracts with the federal government to avoid discrimination and to take affirmative action to see that discrimination will not take place. There has been some conflict between the concept of affirmative action under Title VII, in its remedial sense, and under the Executive Order, in which the term is used more in a preventive sense. In our view, the term as used in the Title VI regulations is more consistent with the usage in Title VII, since both in the permissive and the mandatory sections of the Title VI regulations, the affirmative action is to be taken to correct pre-existing conditions which have a particular impact on the ability of the recipient to provide adequate services to persons of all races and colors.

[68]The discrimination referred to in the illustrative example includes that prohibited by 80.3(b) (2). The caption at the beginning of §80.3 is: DISCRIMINATION PROHIBITED, and at the beginning of 80.3(b): Specific discriminatory practices prohibited. §80.3(b) (4) provides that the enumeration of specific forms of prohibited discrimination in this paragraph (80.3(b)) does not limit the generality of 80.3 (a).

[69]E.G., *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Commission,* 490 F. 2d 387, 398-399 (2nd Cir. 1973); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission,* 482 F. 2d 1333, 1340-1341 (2d. Cir. 1973); *United States* v. *Local Union No. 212, International Brotherhood of Electrical Workers* (6th Cir. 1973) 472 F. 2d 634; *United States* v. *Ironworkers Local 86* (9th Cir. 1971) 443 F. 2d 544, *cert. denied* 404 U.S. 984.



### C. At a Minimum, Cal-Davis Was Permitted to Adopt the Special Program.

If the record is not considered sufficient to rule on the applicability of the mandatory provision, under the circumstances at Cal-Davis, the special admissions program would be authorized by the permissive provision as a "step to overcome the effects of past conditions which resulted in limiting participation by persons of a particular race, color or national origin." There are two major differences between 80.3(b)(6)(i) and 80.3(b)(6)(ii): "(i)" imposes a *requirement*, which is triggered by a *violation* of the prohibitory sections of the regulation; "(ii)" concerns a *permission* which is triggered by "*conditions which resulted in limiting participation*" in the benefits of a program receiving federal financial assistance. Significantly, the same phrase, "affirmative action," is used to describe the behavior which is required by the former and permitted by the latter.

There is, as a practical matter, some overlap between the elements which trigger the *requirement* on the one hand, and the *permission* on the other. "*Conditions* which resulted in limiting participation" could include selection criteria utilized by the institution, which were not acknowledged to be violative of 80.3(b)(2), either because of institutional reluctance to admit a violation, because of institutional ego and a concern about exposure to liability under civil rights provisions,[70] or because the conclusion that the criteria was unlawful was unwarranted. In addition, the term could include conditions brought about by racial discrimination in the private sector[71] or by racial or economic[72] discrimination in

[70] E.g., 42 U.S.C. 1983, which provides a remedy for violation of a person's civil rights on account of race, color or national origin, and 80.3(b)(1)(v).

[71]*Reitman* v. *Mulkey*, 387 U.S. 369 (1969).

[72]In *Serrano* v. *Priest,* the California Supreme Court found economic discrimination to exist in California, as between two various school districts. Davis' approach to identifying disadvantage takes economic conditions into account. (CT 65).

elementary and secondary school districts.[73]

The conditions may come under the heading of "systematic" or "institutional" or "historical" racism, but in human terms they lead to Watts and the barrios, even in the Golden State.[74] Section 80.3(b)(6)(ii) provides a "safe harbor" in saying to the state institutions: "You may take account of these conditions, in your distribution of public benefits, without running the risk of liability." And without that safe harbor, nothing will change.

The illustrative example in the regulations, Section 80.5(j), provides:

> "Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of the program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies or make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service."

[73]E.G., *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Spangler* v. *Pasadena; Johnson* v. *San Francisco; Larry P.* v. *Riles* (Consent Decree); *Soria* v. *Oxnard* 488 F.2D 579 (9th Cir. 1973). The Court has acknowledged the complexity of the factors which may result in racial isolation, *Swann* v. *Charlotte-Mecklenburg School District*, 402 U.S. 1, 29 (1971), and while declining to require one component of state government to correct such conditions, even when they resulted from discrimination by private interests or other public agencies, *Milliken* v. *Bradley*, 418 U.S. 717 (1974), has indicated, *Swann*, *supra*, and other courts have held, e.g., *Lee* v. *Nyquist*, 318 F.Supp. 710 (D.N.Y., 1970), that such action could be taken by the state without contravening the Equal Protection Clause.

[74]See, generally, Conot, Rivers of Blood, Years of Darkness (New York, 1967).



The significant points are: special consideration to race, color, or national origin is expressly permitted; the example of outreach is not a limitation on the "other steps" a recipient may take to provide an inadequately served racial or nationality group with more adequate service.

In light of the express permission of taking race into account and the fact that the substantive provisions use the same term to describe what is required and what is permitted, we believe the illustrative examples 80.5(i) and (j) read together indicated that while milder forms of race-consciousness are preferred in the voluntary or permissive situation, programs such as the one at Davis are allowed, at least where in their absence there would be virtually a total failure to provide the program benefits to minorities.

### D. Title VI Authorized the Applicable Regulations.

The issue of whether the regulations in question are within the authority of the statute is divided into two major subparts: the first concerns the "impact" provision (80.3(b)(2)), and the mandatory affirmative action provision and related illustrative example (80.3(b)(b)(i) and 80.5(i)); the second is concerned with the "permissive" affirmative action provision and the related example (80.3(b)(6)(ii) and 80.5(j)).

With respect to the first group of provisions, this court has already upheld 80.3(b)(2) as authorized by section 602 of Title VI in a somewhat different context, in *Lau v. Nichols.*[75] In *Lau*, this Court held that the provision was violated by the San Francisco school system, because the system failed to provide instruction to some 1700 Chinese-speaking children in a language in which they could communicate. In essence, the

[75]"The Federal Government has the power to fix the terms on which its money allotments to the States shall be disbursed. . . . Whatever may be the limits of that power, they have not been reached here." 414 U.S. at 567.

educational program was violative because English was the medium of instruction. The fact that all the children were treated alike, by teaching them all in English alone, did not mean that there was no "discrimination" against them within the meaning of that term as used in Title VI.[76] *Lau* is the only Supreme Court decision which involved the "impact" discrimination concept under Title VI, but the Court has repeatedly upheld the analogous interpretation of Title VII.[77]

Jefferson v. Hackney,[78] the only other case before this court to consider Title VI, was concerned with the entirely different question of the applicability of the Fourteenth Amendment or Title VI to a situation involving different statutes establishing programs serving different groups of needy people. One statutory beneficiary group, recipients of Aid to Families with Dependent Children, had, in the state, a

[76]This Court's vote in *Lau* was divided between those who felt that the regulation itself would compel the result, and those who felt that it did so only by reference to the HEW guidelines published at 35 Fed. Reg. 11595. In any event, in our view the question of whether Davis was in compliance with the regulation can be answered by reference to the language of the regulation, with the illustrative examples therein.

[77]E.G., *Griggs* v. *Duke Power*, 401 U.S. 424 (1971). *Albemarle Co.* v. *Moody*, 422 U.S. 405 (1975). *Washington* v. *Davis*, 426 U.S. 229 (1976), specifically acknowledged that the concept of discrimination under Title VII, as enunciated in *Griggs*, went beyond the concept under the Equal Protection Clause, standing alone. The Court also indicated that the test in question, which correlated with performance in the police academy, was a reasonable selection device, not violative of Title VII. While the status of that part of the opinion is unclear, since Title VII did not apply to the District of Columbia Government until after the events took place, the Court was undoubtedly declining to follow the EEOC guidelines to the degree that the guidelines would require technical validation of any step in the selection process which had a disproportionate adverse impact on minorities. However, in that case the police department procedures, taken as a whole, resulted in a substantial minority presence on the force, so the basis for applying the guidelines was muted. (There was no consideration, for example, of whether there was a less discriminatory alternative, even assuming the test was job-related).

[78]397 U.S. 821 (1970).



higher percentage of minorities than other beneficiary groups and that group received less favorable treatment than the others at the hand of the legislators. However, even if the needy were viewed as a single class under the four statutory provisions, the subclassifications were established by Congress itself, and reliance on those classification was consistent with the objectives of the program.

The application of the regulation to the current situation is an equally appropriate use of the "impact" theory of discrimination. The mandatory provision and the illustration are consistent with remedial provisions in the other civil rights laws.[79]

The major new question which is presented by the "permissive" regulation, is whether the regulations may permit action to eliminate discriminatory effects, which might be required upon a finding of discrimination, in the absence of such a finding.[80] We believe this is a valid exercise of the power given to the Executive Branch by Section 602 of the Act.[81]

### E. The "Permissive" Regulation Is Consistent With the Statutory Purpose.

Title VI is part of the Civil Rights Act of 1964, which has been called the most significant civil rights legislation since

[79]Cases cited note 69, supra.

[80]If the court agrees that there *is* a violation, or feels that the case should be remanded for consideration of that issue, the question discussed here need not be reached.

[81]Section 602 provides: "Each federal department and agency which is empowered to extend federal financial assistance. . . is authorized and directed to effectuate the provisions of 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

the post-Civil War period.[82] The basic contours of the bill which was to be enacted, including the use of conditions on federal financial assistance, did not receive administration support until June of 1963, when President Kennedy submitted his second civil rights message to the Congress, after a series of events that aroused the nation's conscience.[83] With respect to federal financial assistance, he stated:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.[84]

The related concern that benefits be available to all was expressed by House Judiciary Chairman Celler[85] and Attorney General Kennedy,[86] among others. The significance of these formulations is that they display a concern with the impact of administrative practices in programs receiving federal support.

The general rationale for the Title was set forth by Senator Humphrey as floor manager of the bill on the Senate side. In addition to the concern that benefits paid for by taxation of all would be available to recipients of all races, there was a wish to avoid subjecting the federal government to charges of

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[82]2 Schwartz ed., Statutory History of the United States: Civil Rights, 1017, (N.Y., 1970).

[83]I.

[84]109 Cong. Rec. 11174, 11178, June 19, 1963.

[85]"[The Bill] would assure to Negroes the benefits now accorded only white students in programs of high[er] education financed by federal funds." (110 Cong. Rec. 1623.

[86]House of Representatives, Committee of the Judiciary Hearings on H.R. 7152 before Subcommittee No. 5 of the Committee of the Judiciary, 88th Cong. 1st Sess. ser. 4, pt. IV at 2683 (1963). (hereinafter cited as Hearings).



Fifth Amendment violations growing out of federal support to discriminatory activities.[87]

The broad scope of powers delegated to the executive branch, to define discrimination under the bill, was noted in the hearing held by the Civil Rights Subcommittee of the House Judiciary Committee. Attorney General Kennedy defended the provision as necessary for effective implementation, given the broad scope of activities involved.[88] The extraordinary requirement of presidential approval with regard to rulemaking was inserted in an apparent desire to provide the latitude required, but accompanied by the potent check of White House clearance.[89]

The Title VI statutory scheme is also laden with procedures indicating Congress' strong preference for voluntary compliance.[90] (Title VII likewise has conciliation requirements built into the statutory scheme.[91]) There is an implicit recognition that the federal government cannot accomplish all the objectives of the "Second Reconstruction" by compulsion or any other form of direct contact, but that it can provide a

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[87]110 Cong. Rec. 6544. Title VI was also designed to achieve a uniform and generally applicable antidiscrimination requirement, rather than to have every authorization bill tied up with a "Powell amendment" and to remove any question regarding the authority of federal administrators to enforce national policy in this area under all grant statutes. *Id.*

[88]Hearings, at p. 2765-66. Chairman Celler observed during the hearings,

> This provision of Title VI offers wide discretion there is no question about it. Those who want to give that kind of discretion will [vote for] Title VI, but I don't see how under the circumstances you can hedge that Title around with so many conditions that might vitiate the very purpose of Title VI Id. at 1890.

[89]Letter, Attorney General Kennedy to Senator John Sherman Cooper, April 29, 1964. 110 Cong. Rec. 1075, 1077 (May 5, 1964).

[90]Section 602 provides that no proceedings for the termination of funds may be instituted before there has been an effort to achieve voluntary compliance. Section 80.8 of the Regulations imposes this pre-condition on judicial enforcement proceedings as well.

[91]See, *e.g.*, Section 706(b) of Title VII.

climate within which other parts of the society can make progress.

"Permissive" regulations are highly appropriate both to encourage voluntary compliance when there has been official contact, and to create a legal environment which supports independent initiatives.[92] The rationale for the "safe harbor" aspect of the regulation is apparent in this context; the permission is meaningless except as it confers the stamp of legality upon conduct which would otherwise be questioned.[93]

**F. Title VI Is Constitutional.**

Finally, we believe this scheme of statute and regulation is within the authority of Congress (and, through delegation, the Executive) as an exercise of its power under the Thirteenth[94] and Fourteenth Amendments to the United States Constitution.[95]

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[92]Under Title VII, this is accomplished by section 713 which provides that persons may rely on opinions of the General Counsel of the Equal Employment Opportunity Commission.

[93]Indeed, the Department of Health, Education and Welfare received a complaint from a white applicant against Stanford University in circumstances resembling those in the instant case. After looking into the matter, the Department's Regional Office informed the complainant in 1976 that his complaint did not make out a violation of Title VI, relying in part on the permissive provision of Title VI regulations. Letter, Waite Madison, Chief, Higher Education Branch, Office for Civil Rights, Region IX, U.S. Department of Health, Education and Welfare, June 29, 1976. The program at Davis may have been the subject of similar consideration.

[94]See separate Argument III, supra, regarding the Thirteenth Amendment.

[95]While the immediate rationale for Title VI is the power of the Federal government to impose reasonable conditions upon its extensions of financial assistance, *Lau, supra*, in our view the conditioning of federal assistance is essentially the means of exercising powers conferred by positive law, in the form of these Amendments.



Both the proponents and the opponents of Title VI recognized from the first expressions of the concept in the President's message that the power to impose conditions on federal financial assistance, and to enforce them by, *inter alia*, terminating the assistance, would have its widest and most controversial impact on state and local government.[96] Indeed, one of the major issues in the legislative history of Title VI was the reaction to the suggestion that the executive branch should cut off *all* financial assistance to a state which had an announced segregationist policy.[97] At that time, as at the present, in the majority of statutory programs which would be subjected to the Act, state and local governments were either the only possible recipients or were among those who could be eligible.[98]

There were in existence at the time the bill was being considered, several provisions, including, significantly, the Second Morrill Act for the financing of state land-grant colleges, and the Hill-Burton Act for hospital construction in which Congress had explicitly authorized financial support of separate but equal facilities. While the old practices of separate wards, separate waiting rooms, and lily-white professional staffs have been overcome to a degree, the delivery of medical care is still largely separate, and largely unequal, a condition acquiesced in, and indeed generously supported by the federal government.[99]

The beginning clause of Title VI, "notwithstanding any other provision of law" was inserted with these provisions in mind to clarify that ten years after *Brown*,[100] the federal government was no longer in the business of supporting

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[96]*E.g.*, 110 Cong. Rec. 1075, 2477.

[97]*Supra*, Note 31.

[98]See 110 Cong. Rec. 13382-13414.

[99]See e.g., *Cook* v. *Ochsner Memorial Hospital*, 319 F. Supp. 603, (D.D.C. 1973).

[100]*Brown* v. *Board of Education*, 347 U.S. 483 (1954).

"separate but equal" in health care and higher education. We submit that it is entirely proper, and reasonably designed "to effectuate the purposes of this Act" and to overcome the racial effects of federal-state programs of 70 and 18 years duration, respectively, when the Civil Rights Act was passed, for the Congress, and the Executive Branch, by legislation and implementing regulations to provide, depending on the circumstances, that institutions of higher education participating in such programs either be permitted or required to take affirmative action, including the establishment of a special admissions program like the Davis program to assure that qualified minority applicants would receive a meaningful opportunity to participate.

The perception that controls on state behavior were an essential element of Title VI led supporters such as Congressman McCullough (ranking minority member of the House Judiciary Committee) to specify their reliance on the Fourteenth Amendment as authority for Title VI.[101]

This court has held on a number of occasions that Congress acting under the remedial provisions of the Thirteenth and Fourteenth Amendments may go beyond what those Amendments standing alone would require. This has taken place, for example, by defining discrimination in impact terms as in Title VI[102] and Title VII.[103] The 1972 Amendments to Title VII, which extended its coverage to state and local governments, was expressly based on the Fourteenth Amendment.[104]

Another way in which Congress has been held to be authorized to go beyond the bar requirements of the self-executing provisions of the post-Civil War Amendments is

[101] Schwartz, *Supra* note 82 at 1114.

[102] *Lau* v. *Nichols*, 414 U.S. 563 (1974).

[103] *Supra*, Note 20.

[104] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).



under the Voting Rights Act of 1965, which was based in part on the Fourteenth Amendment.[105] Congress established procedures for preserving the voting power of minority groups whose participation in the franchise had been previously limited. The procedures were applicable whenever a change in district boundaries was to be made and no showing of discriminatory intent was necessary. A majority of the Court and Justice Brennan, concurring in the result, in *United Jewish Organizations of Williamsburgh v. Carey*, ____ U.S. ____ (1977), upheld redistricting in New York which had the effect, under the authority of the Voting Rights Act.

In addition to the nationwide emancipation accomplished by the Thirteenth Amendment without the need for any further enactment, elimination of the badges and incidents of slavery was placed upon the Congress. Congress' power clearly went beyond the master-slave relation itself[106] and as in the Freedmen's Bureau, which was authorized by the same provision as well as the War Powers, the measures undertaken in this regard could be "color conscious." In a sense the Federal government is the trustee of the nation's promise of equality to the freed slaves set forth in the post-Civil War Amendments, as it has been described many times, in relation to the Indian tribes. Compare *Morton v. Mancari*, 417 U.S. 534 (1974). From that perspective, Federal conduct, and State conduct pursuant to federally announced standards, are on a somewhat different footing from State conduct standing alone. We are not suggesting that in a situation where legislation would support or permit the isolation or exclusion of minorities in the exercise of Article I powers, the doctrine of *Bolling v. Sharpe*[107] would no longer apply.

Each of the post-Civil War Amendments was in part executory and in part self-executing. The drafters of the

[105] *Katzenbach* v. *Morgan*, 384 U.S. 563 (1976).

[106] *Jones* v. *Alfred E. Mayer*, 392 U.S. 409 (1968); *Johnson* v. *Railway Express Agency, Inc.* 421 U.S. 454 (1975).

[107] 347 U.S. 497 (1954).

amendments established a partnership between Congress and the Courts to remove the effects of a national disgrace, "root and branch."[108] Title VI and the regulations thereunder, which authorize the program at Davis, are one attempt to complete that unfinished business. It would be anomalous enough in the absence of Title VI, to use the Fourteenth Amendment, which was enacted to overcome the oppression directed at Blacks to strike down measures taken in good faith to end that oppression. Given the existence of Title VI, and its implementing regulations which specifically permit such good faith activities, it would be absurd to use the Fourteenth Amendment to defeat such activities.

## V. CONCLUSION

For the foregoing reasons Amicus Curiae respectfully submits that the judgment of the Supreme Court of the State of California should be reversed.

Respectfully submitted,*

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[108] Compare *Green* v. *New Kent County*, 391 U.S. 430 (1968).

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